INSPECTION AND ENFORCEMENT FOR LOCATABLE SURFACE MANAGEMENT LAWS AND REGULATIONS

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SURFACE RIGHTS ON MINING CLAIMS

Surface Resources Act (PL-167)

On July 23, 1955, Congress adopted an Act commonly called the Surface Resources Act. 30 U.S.C. 612 (1982). Section 4 provides a means for the United States to manage and dispose of the vegetative surface resources and to manage other resources, except locatable mineral deposits. Claims located before July 23, 1955, may retain surface rights, if such claims are verified as being valid under Sections 5 and 6 of the Act. However, claims located after July 23, 1955 are subject to all provisions of the Act, including the Government's right to manage surface resources. This law was enacted in response to abuses of the mining laws where such claims were located for purposes other than mining, such as recreational cabins, fishing and hunting sites, cafes, or for timber, grazing and water rights.

As stated in section 4 of Public Law 167 , the claimant of an unpatented mining claim located after July 23, 1955, has the following surface rights:

1. Unpatented mining claims may not be used for purposes other than prospecting, mining or processing operations and related uses.

2. All surface rights of unpatented claims are subject to the right of the United States, its permittees, and licensees to use so much of the surface as necessary or for access to other lands; however, uses by the United States, its permittees or licensees, shall be such as not to materially interfere with mineral-related operations.

3. If the United States should sell timber from the surface of the mining claim which is subsequently needed for mineral-related operations, the claimant is entitled to be supplied free of charge with timber that is equivalent in kind and quantity to the timber taken from the claim.

4. Timber or vegetative resources may not be removed from a claim for other than mineral-related purposes.

Determination of Surface Rights

Mining claims located prior to the date of Public Law 167 may be made subject to the provisions of section 4 of the Act if a determination of surface rights is made according to a procedure given in sections 5 and 6 of the Act. The head of a Federal department or agency which has surface management responsibilities of Federal lands may file with the Secretary of the Interior a request for publication of notice to mining claimants for determination of surface rights. A notice to mining claimants is published in a newspaper having general circulation in the county in which the lands involved are situated. In addition to a field examination, a title search is made in the county recorder's office to determine the existence and ownership of all mining claims in the involved lands. All owners of record are sent a notice by personal service or registered mail.

The notice, which describes the involved lands notifies the owners of unpatented claim that they must file within 150 days from the date of the first publication of the notice a verified statement which includes; (1) the date of the location; (2) the book and page of the recorded location notice or the certificate of location; (3) the legal description of where the claim is situated; and (4) the names and addresses of the owners and others claiming an interest. If any claimant fails to file a verified statement within 150 days as specified above, failure to do so constitutes a waiver and relinquishment of surface rights so that the claimant would have the same rights under section 4 of the Public Law 167 as though the claim were located after July 23, 1955.

If a verified statement is filed, all claims indicated in the statement are examined by a government mineral examiner for a discovery. Proceedings are initiated on those claims that do not appear to have a discovery and a hearing is held to determine whether the claimant or the Government has the right to manage the surface resources. Although, at the hearing, the claim is contested on the grounds of a lack of discovery, the only effect of a determination adverse to the claimant is a restriction of surface rights as stated in section 4 of the Act. The claim is not invalidated and the claimant does not lose any possessory rights to the mineral or his rights to mine and use as much of the surface as necessary to his mining operation. If the determination is made that the claim has a discovery, the claimant retains the same surface rights he had before enactment of Public Law 167.

The claimant may file a waiver of surface rights and avoid a possible hearing. The effect of this action would give the claim the same surface rights as it would have if located after July 23, 1955.

Claims with Surface Rights Under PL-167

What surface rights does a claimant have who acquired such rights pursuant to the verification process provided by Public Law 167 that a claimant without such rights have? Regardless of the status of surface rights, it has long been held that the surface of an unpatented mining claim cannot be used for some purpose other than mining. Although the claimant has the present and exclusive possession for the purpose of mining, the federal government retains fee title and can protect the land and the surface resources from trespass, waste or from uses other than those associated with mining.

Claims without Surface Rights under Public Law 167

In cases involving mining claims located before July 23, 1955, where the Government does not verify a discovery in connection with a section 5 proceeding, the claimant loses certain surface rights, but still retains the mining claim and all the surface rights necessary to develop and mine the mineral resource. In general there is very little benefit to having surface rights to a mining claim. Perhaps the only advantage in most cases is the right to exclude the public from the claim.

How to Determine if a Claim Has Surface Rights

The best way to determine if a claim located before July 23, 1955, has surface rights is to examine the Master Title Plats maintained in the public room of the BLM. If the claim has surface rights, the right side of the plat will be annotated with a listing of all claims in the township carrying surface rights. If you have reason to believe the plat is improperly annotated, you may request the original case file from the BLM for the appropriate Public Law 167 determination area. The plat should give the number for the case file. Such surface rights can be maintained through a succession of owners so long as the claim is properly maintained and the transfers of interest are proper. If there is a break in the chain of title, surface rights are lost and cannot be reacquired through relocation. For example, many claimants lost surface rights because the owner failed to record the claim or make the requisite

annual filings under section 314 of the Federal Land Policy and Management Act of 1976. Even though the claimant is able to relocate, the surface rights are lost forever.

Timber May Not Be Taken Unless Necessary for Mining

As early as 1901, the Federal courts required that timber may not be removed from a claim unless the use is reasonably necessary to conduct mining operations. The courts have held that appropriate uses of timber include fuel, support for shafts and tunnels, and the construction of buildings. However timber may not be sold, even to purchase mining supplies or equipment.

Mining Claimant Has No Grazing Rights

Possession of the surface of the land included in an unpatented mining claim does not permit the locator to use the mining claim for grazing purposes or to grant this privilege to others.

High Value of Surface Resources Does Not Change Discovery Requirement

The fact that a mining claim is located in a national forest does not qualify the rights of the locator in any way or increase the mineral values required to establish a discovery. However, because the land on which the claim is situated is known to be valuable for purposes other than mining, the Department requires clear and convincing evidence of the values that are claimed in order to establish the validity of the claim.

Sale of Surface Resources Is a Trespass

The sale of surface resources for use unrelated to mining operations constitutes a trespassory taking, even where the funds raised by such sale are used to finance the legitimate mining operations conducted on the site.

Right of Access to Mining Claim

The right of reasonable access for purposes of prospecting, locating, and mining is provided by the mining law. Such access must

be in accordance with the rules and regulations of the Forest Service (36 CFR 228) or the BLM (43 CFR 3809). Although the claimant has the right of access, under these regulations the Government has, under certain circumstances, authority to approve the route and method of access so as to minimize the surface disturbance. However, it is important to emphasize that access to a mining claim is a nondiscretionary right of the miner and is not subject to a right-of-way permit.

Right of Access to Claim is Nonexclusive

The United States mining laws give to the owners of mining claims a nonexclusive right of access across the public lands to their for the purposes of maintaining the claims and as a means of removing the minerals. Although the Department has ruled in several cases that the right of access to a mining claim is nonexclusive, the IBLA has held that where it is in the public interest, multiple locks may be placed on gates to allow entry to only the government and the claimant.

Permit Not Required for Access to Mining Claim

In **Mosch Mining Co.**, 75 IBLA 153 (1983), the Board considered a case where the BLM filed a trespass action against a claimant who constructed an access road to a claim. In response, Mosch, the claimant, filed an application for an exclusive right-of-way. Mosch then appealed from a decision offering the right-of-way grant.

The Board pointed out that section 302(b) of the Federal Land Policy and Management Act of 1976 specifies that "no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress or egress." The Board further noted that the surface management regulations in 43 CFR 3809 make numerous references to access. In conclusion, the Board made the following comments on a claimant's right of access:

1. A claimant is not entitled to exclusivity of access.

2. The grant of a right-of-way under Title V of FLPMA is not the appropriate means to establish a claimants access over and to his mining claims.

3. Access to mining claims should be resolved under the surface management regulations.

Although the **Mosch** case involved BLM-administered lands, it seems likely that the same approach would hold true for Forest Service-administered lands, i.e., access roads to mining claims would be regulated under 36 CFR 228 rather than a right of way grant or permit.

Right-of-Way Permit Required to Transport Water to Mining Claim

In **Desert Survivors**, 96 IBLA 193, 196-97 (1987), the Board held that a right-of-way permit issued under Title V of FLPMA must be obtained before transporting water across public land for any mining purpose. Approval of a right-of-way application is discretionary and the application process is subject to an environmental assessment as required by NEPA. The Board held that the "implied right of access to mining claims never embraced the right to convey water from outside the claim for use on the claim. This latter right emanated from an express statutory grant in the 1866 mining act. * * * In enacting FLPMA, Congress repealed the 1866 grant of a right-of-way for the construction of ditches and canals (see 706(a) of FLPMA, 90 Stat. 2793) and provided, in section 501(a)(1), 43 U.S.C. 1761(a)(1), for the grant of a right-of-way for the conveyance of water under new procedures."

Although the **Desert Survivors** case involved BLM-administered lands in a wilderness study area, the legal basis for the Board's decisions is persuasive that a Title V right-of-way under FLPMA would be required for transporting water across all BLM or Forest Service administered lands.

Power Lines to Mining Claims

Although Congress provided for a right-of-way permit for power lines under Title V of FLPMA as it did for conveyance of water, there was, of course, no mention of power lines in either the 1866 mining act or the mining law of 1872. The BLM and Forest Service surface management regulations (36 CFR 228 and 43 CFR 3809) indicate that water lines and power lines would be authorized under the surface management regulations. At this writing, a power line across federal lands could be authorized by either a right-of-way under Title V of FLPMA or the surface management regulations.

Special Use Permits Do Not Apply to Exploration or Mining Operations

In **U.S. v. Craig**, CR-82-8H (April 16, 1984), the U.S. District for the District of Montana considered a case where a mining claimant appealed from a U.S. Magistrate's judgment finding him guilty of violating the regulations 36 CFR 261.10(a) and 261.12(d). The Forest Service contended that the claimant had damaged a national forest system road and had locked a gate on a forest system road without a special use permit required by 36 CFR 261.

The Montana District Court dismissed the complaints and held that the "appellant was not required to have a special use permit for activities done in connection with mining operations as defined in 36 CFR part 252 (now part 228)." The Court also held that 36 CFR 261 does not apply to a claimant acting under the United States mining laws of 1872 who submitted a proposed plan of operations as required by 36 CFR 228. And any violation of Forest Service regulations should be charged under 36 CFR 228.

Public Access on Unpatented Mining Claims

In **United States v. Curtis-Nevada Mines, Inc.**, 611 F.2d 1277 (9th Cir. 1980), the Court reversed judgment which required members of the general public to have specific written licenses or permits from a state or federal agency in order to gain access to unpatented mining claims for recreational purposes or for entrance to adjacent national forest lands. Since 1970, Curtis-Nevada Mines, Inc. had located 203 mining claims covering approximately 13 square miles on public lands administered by the Bureau of Land Management and on lands within the Toiyabe National Forest administered by the Forest Service. The United States initiated the action to enjoin Curtis-Nevada Mines, Inc., from prohibiting the public access through their unpatented mining claims and public recreational use of the surface of their claims. The Court held that while the BLM or Forest Service may require permits for public use of Federal lands, they need not do so as a prerequisite to public use of surface resources on unpatented mining claims.

In **U.S. v. Curtis-Nevada Mines, Inc.**, the Court also discussed the "exclusive right of possession" to claims located before July 23, 1955. If no determination were ever made or, if the claimant retained surface rights as a result of a determination of surface rights, then the claimant would have the "exclusive right of possession" and would have the right

to exclude the general public from his claim. The Court also indicated the Surface Resources Act was passed largely to limit this exclusive possession in order to permit multiple use by the public.

Residency on a Mining Claim

Uses, such as residency, that are not reasonably incident to mining are not permitted on a mining claim, including those claims located before the Surface Resources Act of July 23, 1955. The right of a locator to place buildings for residential purposes on a claim is based on the requirement that such buildings must be directly related and incidental to the mining operation. In **United States v. Nogueira**, 403 F.2d 816 (9th Cir. 1968), the Court held that "the government can prohibit occupation of a mining claim and collect damages for past trespass where the land is not being used for mining purposes, regardless of whether or not the claim was valid." So according to **Nogueira**, even a valid claim cannot be occupied unless it is being used for mining purposes.

In **United States v. Osterlund**, 505 F.Supp. 165 (DCD Colo. 1981), the Court affirmed **Nogueira** and further held that even if the claims were valid at one time and the structures were used in connection with past mining activities, it would be a trespass to occupy such claims without ongoing mining operations. There is little question that actual continuous exploration or mining operations are required to validate occupancy. Work done just to accomplish assessment work requirements would not qualify. In order to succeed in an action for ejectment, the Government must establish that a claim is invalid, either because the claimant has failed to make a mineral discovery, or because he is not occupying the land in good faith for mining purposes.

Government Remedies for Occupancy Trespass

Even though a claim is valid, the owner has no right to occupy it in the absence of actual and continuous exploration or mining operations. Therefore, it is unnecessary for the government to conduct a validity examination and initiate contest proceedings in order to remove an occupancy trespass. As stated in **Nogueira**, the "court may not deny the United States injunctive relief or damages if trespass upon the public lands is shown." More recently in **United States v. Brown**, 672 F.2d 808, 810 (10th Cir. 1982), the Court said that "people who occupy unpatented mining claims as residences are thus subject to trespass

claims and ejectment actions by the United States if the land cannot be patented."

No Rights by Prescription

A claimant who has continuously occupied a mining claim cannot acquire any rights against the government by prescription or adverse possession.

Abandoned Property on Mining Claims

The three types of abandoned property that might exist on a mining claim or mill site include (1) property attached to realty, (2) personal property embedded in the soil, and (3) personal property not embedded in the soil.

1. **Personal property attached to realty** - This type of property includes permanent, nonmovable fixtures attached to the land such as cabins or other buildings. If the mining claim is abandoned, these fixtures become the property of the United States. If the lands embracing the cabin are subsequently located, the new locator has the same rights of exclusive possession to the cabin as he does to the surface resources on the mining claim. Therefore, rights to use a cabin, or a surface resource on an unpatented claim must be directly related and incident to actual mining operations on the claim.

2. **Personal property embedded in the soil** - This type of property, which is not attached to realty, includes such items as mining equipment embedded in the soil but does not exclude "treasure troves." A treasure trove is defined as "...any gold or silver in coin, plate, or bullion found concealed in the earth, or in a house or other private place, but not lying on the ground, the owner of the discovered treasure being unknown, or the treasure have been hidden so long as to indicate a probability that the owner is dead." Upon abandonment of the claim, this type of property becomes the property of the land owner, the United States. The new locator of this type of abandoned property would have rights to use such property if the use is directly related and incidental to actual mining operations.

3. **Personal property not embedded in the soil** - This type of property, which is found at the surface of realty, includes such items as tools and vehicles. Upon abandonment, such items become the

property of the finder rather than the landowner or the United States. However, ownership of such abandoned property can be claimed by the United States under 40 U.S.C. 484 (m). This section requires that the government assert dominion and control over the abandoned property by taking possession of such property. Until the government takes this affirmative action, the abandoned property remains subject to the claims of whoever first finds the objects and claims title. If the new locator of an abandoned claim containing such property asserts possession over these movable items before the United States does so, ownership of the property would vest in the claimant. Furthermore, there is no requirement that such property be used in connection with mining operations because the claimant would hold a legal rather than a possessory title.

Liability for Unlawful Use, Removal or Damage to Abandoned Property

If a relocator should remove, damage or use property left on an abandoned claim, he may be subject to civil and criminal liability. For example, if the property belongs to the United States, such liability would apply if the relocators use or dispose of the property, regardless of whether the relocator actually believed he had a right to the property.

Removal and (or) sale of appurtenances abandoned by a prior location on an unpatented mining claim by a relocator without right can, under certain circumstances, constitute a criminal act under 18 U.S.C. 641. Maximum penalties for theft of government property may be a fine of up to $10,000 and (or) imprisonment for up to 10 years. Unlike the civil remedies, however, not only must government ownership and a trespassory taking be shown, but it must also be shown that the defendant acted with an intent to appropriate property he know to belong to another.

Intentional damage to property left on an unpatented mining claim by a relocator without right can, under certain circumstances, also constitute a criminal act under 18 U.S.C. 1361. Like the criminal theft statute, and unlike the civil remedies, not only must government ownership and trespassory act be shown, but it must also be shown that the defendant acted intentionally (rather than merely negligently) and with knowledge that the property belonged to the United States.

REGULATIONS ON NATIONAL FOREST LANDS

Introduction

On September 1, 1974, the U.S. Department of Agriculture made effective regulations (36 CFR Part 228) designed to cover prospecting, exploration and mining activities on National Forest Lands by persons operating under the United States Mining Law of 1872, as amended. Although these regulations do not constitute a permit to explore or mine as that is already a statutory right under the 1872 mining law, they do provide that such exploration and mining activities be conducted so as to minimize adverse environmental impacts on the National Forest System.

These regulations apply to all operations concerned with prospecting, exploration, development, mining or processing mineral resources, including access roads and other operations whether on or off a mining claim conducted under the U.S. Mining Laws.

Notice of Intent to Operate

Before initiating any operation which might cause disturbance to the surface resources, a notice of intent to operate must be submitted to the district ranger having jurisdiction over the area to be affected. If the district ranger determines that the proposed operation may cause significant disturbance to the surface resources, a proposed plan of operation must be submitted. A notice of intent to operate and a plan of operation are not required in the following situations: (1) operations that do not involve cutting of trees; (2) operations confined to use of vehicles on existing roads; (3) mineral collecting and sampling of a mineral deposit that does not cause a significant disturbance of the surface resources; and (4) location of a mining claim.

The notice of intent to operate must include sufficient information to identify the nature of the proposed activities, the route of access and the method of transport. The district ranger must notify the operator within 15 days whether or not a plan of operations is required.

Plan of Operations

Among other things, the plan of operations must include the name and address of the operators, a map of the proposed site of operation delineating all roads and other areas to be affected, a description of type of operation, including how and where it will take place and environmental and reclamation procedure. If it is not feasible to prepare a complete plan for the entire operation, an initial plan may be submitted and augmented later by supplemental plans as the project develops.

Upon receipt of the proposed plan of operation, the district ranger has thirty days to review the plan and notify the operator that: (1) he has approved the plan; (2) the proposed operations do not require an operating plan; (3) modification of the plan is necessary; (4) more time, not to exceed an additional sixty days is required to review the plan; or (5) the plan will not be approved until a final environmental statement has been prepared and filed with the Council on Environmental Quality, if an EIS is needed. While reviewing the plan of operation, the district ranger makes an environmental statement is required. Certain information in the plan of operation may be designated as confidential and will not be available for public inspection.

Reclamation Requirements

The operator is required to reclaim all lands affected by the mining operation, during the mining operation, if feasible, or within one year after termination of mining operations. Reclamation procedures specifically include: (1) control of erosion and landslides; (2) control of water runoff; (3) removal and control of toxic substances; (4) rehabilitation of fisheries and wildlife habitat; and (5) reshaping and revegetation of disturbed areas, where reasonably practicable. Also, within a reasonable time following a cessation of mining activities, the operator is required to remove all structures and equipment and clean up the site of operation.

Bonding

In certain cases, operators required to file a plan of operations will also be required to furnish a bond conditioned upon reclamation of the site of operations. The basis for determining the amount of bond will be the estimated cost of reclamation of the area of operations. As each portion of the site is reclaimed, the bond may be reduced proportionately.

Residency Covered by Regulations

In **United States v. Langley**, 587 F.Supp. 1258, 1266 (E.D. Cal. 1984), the Court held that the claimant's residence is covered by the Forest Service regulations and must not exist unless approved under an operating plan.

Operating Plan Approval May Require an EIS

In some cases, the approval of an operating plan may require the preparation of an Environmental Impact Statement (EIS). Any major federal action which is likely to have a significant effect on the environment requires such a statement. The need for an EIS is normally identified in the environmental assessment. **Thomas v. Peterson**, 753 F.2d 754 (9th Cir., 1985).

Operating Plan Required for Structures on Mill Site

In **United States v. Brunskill**, 792 F.2d 938 (9th Cir. 1986), the Court required mining claimants "to remove at their expense a cabin, a mill, and other structures from their mill site on Forest Service land and to pay the United States $1,000 to restore the land to its natural state." If the claimants do not remove the structures within one year, the government was given permission by the Court to remove the structures and assess the claimants costs. The Court also found that the claimants "are required to have an approved operating plan for their cabin, mill and other structures because each of those structures constitute a surface disturbance within the meaning of 36 CFR 228.

Terms of Approved Plan Exceeded

In **United States v. Doremus**, 658 F.Supp. 752 (D. Idaho 1987), a miner appealed a conviction in a Court trial before a United States Magistrate for exceeding the terms of an approved operating plan and damaging natural resources on national forest land. United States District Court Judge Ryan affirmed the decision of the magistrate and conviction of the appellants.

The operating plan required by 36 CFR 228.1-228.63 was signed by the appellant in 1985. The plan provided that no more than five trenches be opened at one time and that exploration be confined to the

clearout area. The claimants were also prohibited from using live timber and that all amendments be in writing. Apparently more than thirty trenches were opened, some larger than approved in the plan, and live trees were pushed over. Other regulations such as 36 CFR 261.9(a) and 261.10(k) prohibit certain other conduct such as damaging natural features, property of the United States. Criminal Charges for violation of these regulations is authorized by 16 U.S.C. 551. The Court held that 36 CFR 261.9(a) and 261.10(k) are clear and not constitutionally vague.

Loss of Mineral Rights from Unapproved Plan

In **David Doremus v. United States**, Civil No. 88-3103 and 3105 (October 28, 1988), a claimant was enjoined from conducting mining operations in the Gospel Hump Wilderness area until his plan of operations was approved. In this case Doremus had located 23 placer claims and 103 tunnel site claims in a Wilderness area that would be closed to mining on December 31, 1988.

Doremus submitted a plan for Forest Service approval which would allow him an opportunity to make discoveries on his placer claims and to initiate tunnels on his tunnel site claims. In order to establish valid existing rights to the claims and sites, the work must be done by December 1988. Without approval of the operating plan, Doremus would be unable to establish rights that could relate back to before December 31, 1988.

In noting that Doremus is well aware of the requirements to get approval of an operating plan, the Court cited a case where a miner faced the loss of mineral rights if certain actions were not completed by a given date and held that a miner could not claim injury when he had not allowed sufficient time for obtaining permits. **Downstate Stone Co. v. United States**, 651 F.2d 1234, 1241 (7th Cir. 1981).

Appeals Procedure

In response to an adverse action or decision by the district ranger, an appeal may be made in written form setting forth the manner in which the decision is contrary to the facts, law, regulations or is otherwise in error. This written statement must be filed with the district ranger within thirty days of the date of notification of the contested decision. Upon receipt of the statement, the district ranger will forward it, together with his own statement to the forest supervisor. The final administrative

appeal may be taken to the regional forester. Upon receiving an adverse decision by the regional forester, the claimant may go directly to the courts for judicial review.

Court Approval of Forest Service Regulations

Although the regulations (36 CFR Par 228) have been challenged numerous times on the basis of insufficient statutory authority, the courts have consistently upheld their validity. Under sections 478 and 551 of Title 16, the Secretary of Agriculture has authority to develop regulations concerning the methods of prospecting and mining in the national forest.

In **United States v. Curtis-Nevada Mines.**, 415 F.Supp. 1373 (DC Cal 1976), affirmed in part, reversed in part on other grounds 611 F.2d 1277 (1980), the Court held that owners of unpatented mining claims located in the national forest are required to file operating plans as required by the regulations in 36 252, prior to initiating mining operations.

In **United States v. Goldfield Deep Mines Co. of Nev.**, 644 F.2d 1307 (9th Cir. 1981), cert. denied 455 U.S. 907 1982), the United States sued for trespass, seeking injunctive relief and damages. The Ninth Circuit Court of Appeals affirmed the District Court's award of the requested relief. Goldfield cut trees, dug roads and used heavy equipment and machinery in the national forest in San Bernardino, California and refused to file an operating plan as required by the regulations (36 CFR Part 228). The United States Marshall seized the equipment and prevented Goldfield from further operations. The Government was also awarded damages totaling $17,560.

Regulations Apply to Wilderness

The regulations (36 CFR 228 and 293) also apply to mineral-related activities in wilderness and primitive areas. The Act that created the National Wilderness Preservation system in 1964 (Act of September 3, 1964) specified that prospecting for minerals and location of mining claims would be permitted in wilderness areas through December 31, 1983. Although prospecting and mining are authorized, they must be conducted in a manner as compatible as possible with preservation of the wilderness. Therefore, the standards under which the regulations are applied in a wilderness are somewhat stricter than on other lands. Special limitations and restrictions have been placed on the use of mechanized equipment. For example, no operator shall construct roads

across a National Forest Wilderness unless authorized in writing by the Forest Supervisor.

Special Use Permits Do Not Apply to Exploration or Mining Operations

In **United States v. Craig**, CR-82-8-H (April 16, 1984), the U.S. District Court for the District of Montana considered a case where a mining claimant appealed from a U.S. Magistrate's judgment finding him guilty of violating the regulations 36 CFR 261.10(a) and 261.12(d). The Forest Service contended that the claimant had damaged a national forest system road and had locked a gate on a forest system road without a special use permit as required by 36 CFR 261.

The Montana District Court dismissed the complaints and held that the "appellant was not required to have a special use permit for activities done in connection with mining operations as defined in 36 CFR 228. The Court also held that 36 CFR 261 does not apply to a claimant acting under the United States mining laws of 1872 who submitted a proposed plan of operations as required by 36 CFR 228. And any violation of Forest Service regulations should be charged under 36 CFR 228.

Violators of Regulations Subject to Criminal Sanctions

In **U.S. v. Langley**, 587 F.Supp. 1258 (E.C. Cal. (1984), the district court enjoined claimants from conducting mining operations using a D-4 caterpillar and maintaining a residence on a claim without obtaining an approved plan of operations as required by 36 CFR 228. The Court noted that "violations of the regulations may subject the violator to criminal sanctions under 16 U.S.C. 551." This section provides that "any violation of the ...rules and regulations (enacted for the protection of national forests) shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both."

The Granite Rock Case

In **California Coastal Commission v. Granite Rock Company**, 55 LW 43666 (1987), the United States Supreme Court held that Federal law does not preempt reasonable state environmental permitting requirements for mining activity on unpatented mining claims. In 1980, Granite Rock Company submitted to the Forest Service a 5-year plan of

operations under the regulations in 36 CFR 228 for a mining operation on unpatented mining claims on National Forest lands near the California coast. The Forest Service sent the plan to the California Coastal Commission for consistency review under the California Coastal Act. The Commission did not respond so the Forest Service approved the plan.

In 1983, the Coastal Commission instructed Granite Rock to apply for a coastal development permit. Granite Rock refused and filed suit in Federal District Court. The District Court denied Granite Rock's motion for summary judgment and dismissed the action. The Ninth Circuit Court of Appeals reversed the District Court and held that an "independent state permit system to enforce state environmental standards would undermine the Forest Service's own permit authority and is preempted." Therefore, Granite Rock Company is not subject to the permit authority of the California Coastal Commission.

The Supreme Court reversed the Ninth Circuit and held that the surface management regulations 36 CFR 228 (Forest Service) and 43 CFR 3809 (BLM) do not preempt state laws and regulations relating to the conduct of operations or reclamation on Federal lands under the mining laws. Furthermore, the Court noted the federal regulations contemplate compliance with state environmental permit requirements. The state's involvement appears to be limited to those areas where the federal law does not regulate. The decision distinguished environmental regulation from land use planning with the assumption that federal land use planning laws preempt state land use planning requirements from applying to federal lands. The decision also indicates that the states may not control use of federal land by land use planning or by denying environmental permits.

BLM'S SURFACE MANAGEMENT REGULATIONS

Introduction

The Federal Land Policy and Management Act of October 21, 1976 (FLPMA) directed the Secretary of the Interior to take any action necessary by regulation or otherwise to prevent unnecessary or undue degradation of the lands. To implement this part of FLPMA, the Secretary issued proposed "3809 regulations" on December 6, 1976 which were then reproposed March 3, 1980. The final 3809 regulations

were made effective January 1, 1981 (45 FR 78902; 43 CFR 3809), apply to surface disturbances made in connection with mining operations conducted under the Mining Law of 1872, as amended. 30 U.S.C. 21-54 (1982).

The compliance process is similar to that authorized by the Forest Service regulations (36 CFR Part 228). The final regulations address three levels of exploration and mining activity: (1) for casual use where mechanized earth-moving equipment and explosives are not used, there is no requirement to contact the BLM; (2)if proposed exploration or mining activities would cause a surface disturbance of five acres or less per year, the operator is required to submit a "notice" to BLM 15 days before starting work; and (3) a plan of operations must be submitted to the BLM if surface disturbance is more than five acres per year, or if the operations are proposed in certain specified environmentally-sensitive areas. The "plan of operations" must contain a detailed description of the proposed mining and reclamation activities. Once submitted to the BLM, the plan is reviewed and processed in much the same manner as plans filed under the Forest Service regulations. All operations, whether casual, under a notice, or under a plan of operation must be reclaimed. 43 CFR 3809.1-1.

Jurisdiction of Regulations

The regulations generally apply to all BLM-administered lands subject to the mining law. The regulations do not cover lands included in the National Park System, the National Forest System, the National Wildlife Refuge System and the Stock-raising Homestead lands or lands where only the mineral interest is reserved to the United States. Lands under Wilderness Review and administered by the BLM are subject to regulations in 43 CFR 3802 and not to the 3809 regulations.

Unnecessary or Undue Degradation

"Unnecessary or Undue Degradation" is defined in 43 CFR 3809.0-5(k) as surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses. Failure to reclaim disturbed areas may also constitute unnecessary and undue degradation.

Casual Use - No Notice or Plan Required

No notification to the BLM is required for casual use, however casual use operations may be monitored to ensure that unnecessary and undue degradation does not occur. The regulations define "casual use" as activities ordinarily resulting in only negligible disturbance of the federal lands and resources. For example the use of mechanized earth moving equipment and explosives is not allowed under casual use.

Notice Required for Disturbance of 5 Acres or Less

Operators on project areas whose operations, including access across federal lands, cause a cumulative surface disturbance of 5 acres or less during any calendar year must file a notice with the Bureau of Land Management. A "project area" is defined as a single tract of land upon which an operator is, or will be, conducting operations. It may include more than one mining claim under one ownership as well as federal lands on which an operator is exploring or prospecting prior to locating a mining claim. Before an operator may conduct additional operations under another notice, all lands disturbed under a previous notice must be reclaimed. "Reclamation" is defined in the regulations as taking such reasonable measures as will prevent unnecessary or undue degradation of the federal lands, including reshaping land disturbed by operations to an appropriate contour. Revegetation of disturbed areas may be necessary so as to provide a diverse vegetative cover.

A written notice of planned activities must be submitted to the BLM at least 15 calendar days before starting operations. The Notice must describe the operations and their location and must contain a statement that the lands will be reclaimed to standards provided in the regulations. No approval or bonding is required, but the BLM may request a meeting with the operator when road construction exceeds certain specifications.

Notice Does Not Require Environmental Assessment

In **Sierra Club v. Penfold**, Civil No. A86-083 (January 29, 1987), the Federal District Court of Alaska held that the filing of a notice is not a Federal "action" under the CEQ regulations (40 CFR 1501.4(b) and 1508.18) because no approval is required before beginning operations. NEPA documents are not required where there is no Federal "action."

The Sierra Club had contended that no mining can proceed until an environmental assessment is completed.

Plan of Operations - Disturbance of More Than 5 Acres or Mining in Special Areas

A plan of operations must be submitted to the BLM if surface disturbance exceeds 5 acres for a single calendar year, or if the operations are proposed in the following areas: (1) California Desert Conservation Area; (2) areas designated for potential addition to, or an actual component of the National Wild and Scenic River System; (3) designated areas of critical environmental concern; (4) areas designated as part of the National Wilderness Preservation System which are administered by the BLM; (5) areas withdrawn from operation of the mining laws in which valid existing rights are being exercised; and (6) areas designated as "closed" or "limited" to off-road vehicle use.

A plan of operations must be filed in the District Office of the BLM having jurisdiction over the lands to be affected. The regulations specify the contents of the plan which need not be prepared in any special form.. Generally, the plan will describe operators, nature of the operations and a map will be required. The plan must also describe measures to be taken to prevent unnecessary or undue degradation and measures to reclaim disturbed areas.

Plan Approval

Upon submission of a proposed plan of operations, the BLM acknowledges receipt of the plan and has 330 days to approve or require changes in the plan. If changes in the plan are necessary, or additional time is needed to review the plan, an extension of time, not to exceed 60 days, may be required; however, days during which the area of operations is inaccessible for inspection are not counted when computing the 60-day period. The plan cannot be approved until the BLM has complied with section 106 of the National Historic Preservation Act or section 7 of the Endangered Species Act.

Modification of Plan

The regulations provide for modifications of an approved plan. Significant modifications require approval in the same manner as an initial

plan. Plan modification may either be required by the BLM or requested by the operator.

Lands Disturbed under Prior Notice Must Be Included in Determining if Plan Required

Deferral of reclamation for certain legitimate mining purposes is allowed by the regulations. However before conducting additional operations under a subsequent notice, the operator shall have completed reclamation of operations which were conducted under any previous notice. Therefore any lands disturbed by mining may be legitimately deferred, but all disturbed land must be included in the computation of surface disturbance for the purpose of determining whether a plan of operations is required. 43 CFR 3809.1-3(a); **Differential Energy, Inc.**, 99 IBLA 225, 231 (1987).

Operating Plans Subject to Stipulations

In **Draco Mines**, 75 IBLA 278 (1983), it was held to be proper for the BLM to condition the approval of a plan of operation on the acceptance of stipulations designed to prevent unnecessary and undue degradation of the public lands. It is also required that such stipulations are reasonable and properly reflect considerations of the public interest.

BLM Discretion in Approving a Plan

BLM may make its approval contingent upon acceptance of various modifications designed to prevent or mitigate undesired impacts. Such modifications may make it more difficult or more expensive for the claimant to develop the property. BLM may require design changes in plant operation or in the route of access. BLM may not, however, absolutely forbid mining or totally bar access to a valid mining claim. **Southwest Resource Council**, 96 IBLA 105, 120 (1987).

Plan Approval May Constitute "Major Federal Action"

The approval of a plan of operations not only is a "Federal action," requiring an environmental assessment, but may also be a "major Federal action" requiring an environmental impact statement. **Southwest Resources Council** at 121.

"Unnecessary and Undue Degradation" Relates to Validity

In **Southwest Resource Council**, the appellant asserted that BLM cannot determine whether unnecessary or undue degradation is occurring without a determination that a valuable mineral deposit has been discovered; or in effect, arguing that any degradation of the federal lands caused by the development is necessarily undue and unnecessary if there exists no right to enter such lands. The Board stated "that the determination of the question whether unnecessary or undue degradation will occur necessarily assumes the validity of the use which is causing the impact," and therefore a validity examination should not necessarily be prerequisite to approval of a plan of operations.

However the Board noted that BLM is not precluded from determining the validity of a claim. If "BLM determined that the claims were not supported by a discovery, the proper course of action would be to initiate a contest as to the claims' validity and suspend consideration of the plan of operations pending the outcome of the proceedings."

Noncompliance for Lack of State Permits

A notice of noncompliance may be based on the failure of an operator to obtain state permits. However, a decision alleging a lack of compliance with state permitting requirements should clearly delineate the permits needed and clearly describe the reasons why each permit is needed. **Bruce W. Crawford**, 86 IBLA 350, 401 (1985).

Plan Approval for Occupancy Not Required

Under the regulations, there is no requirement that a claimant obtain prior approval to establish occupancy. In fact, a claimant could proceed to erect a cabin in the face of BLM's objections and not violate any element of the regulations. **Bruce W. Crawford** at 381 and 391. In the **Crawford** case, the Board pointed out that under the present regulations the BLM must react to rather than anticipate the occupancy activities of a claimant. For example, if BLM determined that the placement of a cabin on a claim constituted unnecessary or undue degradation, it could issue a notice of noncompliance on such grounds. However, the regulations require that such occupancy be duly described in a notice. An occupancy that is described in a notice can be prohibited, only by a showing that such occupancy results in unnecessary or undue degradation.

Hearing Necessary to Determine if Occupancy Is Incidental to Mining

If there is no mining activity on a claim, a determination can be made that occupancy of such a claim is not reasonably incidental to mining. This determination can be made without the benefit of a fact-finding hearing. However, if some mining activity is taking place and the claimant contends that occupancy of the claims is necessary in order to develop the mineral deposits, the effect of an order requiring such a claimant to cease occupancy is tantamount to a taking of the right to mine. Where mining is occurring and the Government seeks to challenge occupancy as not reasonably incident to such mining activities, the Government must provide notice and an opportunity for hearing prior to ordering the cessation of occupancy. **Bruce W. Crawford** at 350, 373 and 401.

Occupancy Is Challenged by Contest

If BLM desires to challenge a claimant's occupancy on the basis that such occupancy is not reasonably related to the mining activities, or that the specific occupancy is causing unnecessary or undue degradation, a contest alleging such grounds should be initiated. **Bruce W. Crawford** at 401.

Two or More Plans of Operation on One Mining Claim

If more than one plan of operation should be filed for a single claim, each plan of operation will be reviewed on its own merits and approved if it complies with the regulations. The reason for this is the Department of the Interior has no authority to become involved in determining right of possession of a mining claim.

Access to Claims Covered by 3809 Regulations Rather than Right-of-Way Permit

Mosch Mining Co., 75 IBLA 153 (1983) was a case where the BLM required a claimant to file an application for a right-of-way permit to construct an access road to a mining claim. On appeal the Board held that "the grant of right-of-way was not the appropriate means of resolving the question" and "the matter should have been resolved under the

surface management regulations. Although this case dealt with BLM administered lands, it seems certain that the Forest Service surface management regulations (36 CFR 228) would cover access to claims in the same manner.

Bonding Requirements

Mining operations conducted under an approved plan may require a bond. The amount of bond is normally based on the estimated cost of reclamation; however, no bond may be required if the operations would cause only minimal disturbance to the land. In lieu of a bond, the operator may deposit and maintain in a Federal depository account of the United States Treasury, a cash bond or negotiable securities of the United States. The regulations also provide for blanket bonds covering statewide or nationwide operations.

Noncompliance

Failure of an operator to file a notice or a plan of operations may result in being served a notice of noncompliance or being enjoined from continuing such operations by a court order. Also, failure to reclaim disturbed areas or follow an approved plan of operation will subject the operator to a notice of noncompliance. Actions specified in a notice of noncompliance must be corrected in 30 days; failure to take necessary actions may be justification for requiring a plan of operations and mandatory bonding.

Appeals

Any operator adversely affected by a decision of the authorized officer has the right of appeal to the State Director of the BLM. The decision of the State Director, when adverse to the appellant, may be appealed to the Board of Land Appeals. The adversed party in a decision of the Board of Land Appeals may then appeal that decision to the federal courts.

Court Approval of BLM Surface Management Regulations

United States District Court Judge Ramirez issued an order to the locators of a mining claim enjoining and restraining them from conducting any mining operations on the claim unless they submit a plan of operations pursuant to 43 CFR 3809 and obtain approval. This is the first federal court requirement that a mining claimant comply with the BLM surface management regulations. **United States v. Bales**, 522 F.Supp. 150 (E.D. Cal. 1981).

Validity of the Use and "Unnecessary and Undue Degradation"

In Bruce W. Crawford, 86 IBLA 350, (1985), the Board examined the interrelationship between the determination whether a use was "reasonably incident" to mining and the determination that a use resulted in "unnecessary or undue degradation." The Board stated at 396:

> The key distinction to keep in mind is that the "reasonably incident" standard resolves questions as to the permissibility of a use by determining whether or not the use is reasonably incident to the mining activities actually occurring. The "unnecessary or undue degradation" standard comes into play only upon a determination that degradation is occurring. Upon such an initial determination, the inquiry then becomes one of determining whether the degradation occurring is unnecessary or undue assuming the validity of the use which is causing the impact. For, if the use is, itself, not allowable, it is irrelevant whether or not any adverse impact is occurring since that use may be independently prohibited as not reasonably incident to mining. [Emphasis in the original]

Relationship of "Unnecessary and Undue Degradation" to Validity

In Southwest Resource Council, 96 IBLA 105 (1987), the appellant asserted that BLM cannot determine whether "unnecessary or undue degradation" is occurring without a determination that a valuable mineral deposit has been discovered; or in effect, arguing that any degradation of the federal lands caused by the development is necessarily undue and unnecessary if there exists no right to enter such lands. The Board stated "that the determination of the question whether unnecessary or undue degradation will occur necessarily assumes the validity of the use

which is causing the impact," and therefore a validity examination should not necessarily be prerequisite to approval of a plan of operations. Id. at 122.

However the Board noted that BLM is not precluded from determining the validity of a claim. If "BLM determined that the claims were not supported by a discovery, the proper course of action would be to initiate a contest as to the claims' validity and suspend consideration of the plan of operations pending the outcome of the proceedings." Id at 124.

3809 Regulations to Prevent Unnecessary or Undue Degradation

In Differential Energy, Inc., 99 IBLA 225, 229 (1987), the Board pointed out that the surface management regulations of 43 CFR 3809 were issued to implement the Secretary's statutory requirement to "take any action necessary to prevent unnecessary or undue degradation of the lands." The Board said at 229:

> In managing the public lands the Secretary of the Interior is mandated by law to "take any action necessary to prevent unnecessary or undue degradation of the lands." Federal Land Policy and Management Act of 1976 (FLPMA), 302(b), 43 U.S.C. 1732(b) (1976). This provision was expressly recognized in sec. 302(b) of FLPMA as affecting the rights of claimants under the mining law of 1872. The surface management regulations of 43 CFR Subpart 3809 were promulgated pursuant to this authority.

BLM Does Not Approve Notice

The regulations, 43 CFR 3809.1-3(b), clearly show BLM does not approve or disapprove a notice. Bruce W. Crawford, 86 IBLA 350, 391 (1985). If an individual is required by the regulations to file a notice and receives a notice of noncompliance for failure to file, he may remedy the deficiency by filing the required notice. Id.

Noncompliance for Lack of State Permits

A notice of noncompliance may be based on the failure of an operator to obtain state permits. However, a decision alleging a lack of compliance with state permitting requirements should clearly delineate

the permits needed and clearly describe the reasons why each permit is needed. Bruce W. Crawford, 86 IBLA 350, 401 (1985).

Prior Approval for Occupancy Not Required

Under the regulations in 43 CFR 3809, there is no requirement that a claimant obtain prior approval to establish occupancy. In fact a claimant could proceed to erect a cabin in the face of BLM's objections and not violate any element of the regulations. Bruce W. Crawford, supra at 389, 391. In the Crawford case, the Board pointed out that under the present regulations the BLM must react to rather than anticipate the occupancy activities of a claimant. For example, if BLM determined that the placement of a cabin on a claim constituted "unnecessary or undue degradation," it could issue a notice of noncompliance on such grounds. However, the regulations require that such occupancy be duly "noticed" (described in a notice). Occupancy that is duly "noticed" can be prohibited, only by a showing that such occupancy results in unnecessary or undue degradation. Id. at 389, 391.

Notice Does Not Require Environmental Assessment

In Sierra Club, et al. v. Michael Penfold, et al., Civil No. A86-083 (January 29, 1987), the Federal District Court of Alaska held that the filing of a notice under 43 CFR 3809.1-3 is not a Federal "action" under the CEQ regulations (40 CFR 1501.4(b) and 1508.18) because no approval is required before beginning operations. NEPA documents are not required where there is no Federal "action." The Sierra Club had contended that no mining can proceed until an environmental assessment is completed.

Legal Guidelines for Determining if Regional EIS Is Necessary

The controlling legal guidelines for determining when a regional EIS is required were established by the Supreme Court in Kleppe v. Sierra Club, 427 U.S. 390 (1976). In Peshlakai v. Duncan, 476 F. Supp. 1247 (D.D.C. 1979), the District Court summarized the Supreme Court's holding at 1258:

> [S]uch environmental impact statements are required in two and only two instances: (1) when there is a comprehensive federal plan for the development of a region, and (2) when various federal

actions in a region have cumulative or synergistic environmental impacts on a region.

Environmental Analysis

In William E. Tucker, 82 IBLA 324 (1984), the Board concisely stated under what circumstances it would uphold a "finding of no significant impact" as developed in an environmental assessment by the BLM:

> The question of whether a proposed action will have a significant environmental impact based on facts developed in an environmental assessment, is one of the principal bases for determining whether an agency is required to prepare an environmental impact statement (EIS). Section 102 of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332 (1982), requires preparation of an EIS in the case of "major Federal actions significantly affecting the quality of the human environment."
>
> The reasonableness of a finding of no significant impact has been upheld where the agency has identified and considered the environmental problems; identified relevant areas of environmental concern; and made a convincing case that the impact is insignificant, or if there is significant impact, that changes in the project have sufficiently minimized such impact.

If the modifications completely compensate for any adverse environmental impacts stemming from the original proposal, the statutory threshold of significant environmental effects will not be crossed, and an environmental impact statement (EIS) will not be required. Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, 685 F. 2d 678 (D.C. Cir. 1982). In two cases the Board has reviewed a finding of no significant impact for a proposed mining plan of operations, i.e. an EIS was not required. William E. Tucker, 82 IBLA 324 (1984). In Tulkisarmute Native Community Council, 88 IBLA 210 (1985), the Board held "that a BLM management decision will be upheld on appeal where the decision is based on an EA which reflects an evaluation of the environmental impacts sufficient to support an informed judgement." Id. at 220.

Challenge to a Finding of No Significant Impact

In Southwest Resource Council, 96 IBLA 105 (1987), the Board considered an appeal by southwest Resource Council (SRC) on the approval of a major modification of a plan of operations submitted by Energy Fuels Nuclear, Inc. (EFN). SRC challenged the BLM's finding of no significant impact (FONSI) for the proposed operation on the basis that it did not include an analysis of cumulative impacts resulting from existing and reasonably foreseeable future developments. A finding of no significant impact allows approval of a proposal without preparation of an environmental impact statement. Upon review of the BLM's environmental assessment the Board determined the BLM's FONSI is supported by the small size of the minesites and the lack of likelihood that a minesite will be located sufficiently close to the EFN proposed project to cause synergistic effects.

Activities Not Involving a "Federal Action"

In Southwest Resource Council, supra at 119, the Board described the types of activities that would represent a "federal action" within the meaning of NEPA, therefore requiring the agency to prepare an environmental assessment (EA):

> It is clear that no Federal action is involved in the act of prospecting for minerals or locating claims. These activities occur through the volition of private entities acting under statutory authority. Nor do we perceive that any "federal action" within the meaning of section 102 of NEPA occurs when BLM receives a "notice of intent" filed pursuant to 43 CFR 3809.1-3, where less than 5 acres of land are being disturbed in any calendar year. As we noted in Bruce W. Crawford, 92 I.D. 208, 230-31 (1985), BLM neither approves nor disapproves a notice. Accord, Sierra Club v. Penfold, A-86-083 Civil (D. Alaska, Jan. 9, 1987). It may consult with a mining claimant over aspects of his activities but, under the present regulatory scheme, it may not bar his planned activities.

EIS Required on Cumulative Impact of Numerous Plans of Operations

In Sierra Club v. Penfold, A-86-083 Civil (D. Alaska, Jan. 9, 1987), the Federal District of Court of Alaska ruled that under NEPA, BLM is required to study the cumulative impact of some 60 placer mining opera-

tions that contribute incrementally to siltation and other environmental degradation of Birch Creek - a National Wild River. It was held that 60 or more placer mines are related in such a way as to require unified analysis under NEPA. The Court ordered BLM to conduct an environmental impact statement on the cumulative impacts on the watershed caused by individual operations disturbing five acres or more. Approximately 23 of the 60 placer mines in the watershed operated under plans of operation as required under 43 CFR 3809.1-6.

In footnote 7, page 7, the Court said the "twenty-three mining operations in the watershed approved pursuant to 43 CFR 3809.1-6 are, of course, "federal actions" for the purpose of NEPA. Although the Court did not go so far as to enjoin operations approved under plans from working during the 1987 season, it enjoined BLM from approving any placer mining Plan of Operation on the watershed of Birch Creek National Wild River until an EIS assessing cumulative impacts has been prepared. Prior approvals were declared void as of that date.

Validity of the 1983 Amendments

On remand from the Ninth Circuit Court of Appeals, the Federal District Court of Alaska (Sierra Club v. Penfold, Id.) was required to address the validity of the mining regulation in 43 CFR 3809.1-3. On March 2, 1983, BLM amended the regulations to allow notices to apply to withdrawn areas and areas limited or closed to off road vehicle use. In holding that the 1983 amendments are invalid, the Court stated:

> Because the 1983 rulemaking was procedurally defective, the 1983 amendments to 3809 must be declared invalid. As a result of this invalidation, certain mines presently under the Notice regulation will revert to treatment under the Plan of Operations system.

Lands Disturbed under Prior Notice Must Be Included in Determining if Plan of Operations Is Required

Deferral of reclamation for certain legitimate mining purposes is allowed by the regulations, 43 CFR 3809.0-5(j) and 3809.1-3(d)(5). However before conducting additional operations under a subsequent notice, the operator shall have completed reclamation of operations which were conducted under any previous notice. 43 CFR 3809.1-3(a). Differential Energy, Inc., 99 IBLA 225, 231 (1987). Therefore any lands

disturbed by mining may be legitimately deferred, but all disturbed land "must be included in the computation of surface disturbance for purposes of determining whether a plan of operations is required." Id. at 231.

Burden on Claimant to Show Plan of Operation Is Not Necessary

"Where.....a party appeals from a BLM determination that a plan of operations is necessary under 43 CFR 3809.1-4, it is the obligation of the appellant to show that the determination is incorrect. Unless a statement of reasons shows adequate basis for appeal and appellant's allegations are supported with evidence showing error, the appeal cannot be afforded favorable consideration. Howard J. Hunt, 80 IBLA 396 (1984). Where BLM determines that unreclaimed surface disturbance and proposed operations will cause a cumulative surface disturbance of more than 5 acres, and the claimant challenges that determination, the burden is on the claimant to show that 5 acres or less will be affected." Differential Energy, Inc., supra at 235.

Approval of Plan of Operations Is "Federal Action"

In Southwest Resource Council, supra at 120, the Board held that approval of a mining plan of operations is a "Federal action" within the meaning of 42 U.S.C. 4332 (1982). It also described the limits of authority to the BLM in approving a plan of operation:

> When a mining claimant is required to file a plan of operations, however, BLM has considerably more leeway. It may make its approval contingent upon acceptance of various modifications designed to prevent or mitigate undesired impacts. Such modifications may make it more difficult or more expensive for the claimant to develop the property. BLM may require design changes in plant operation or in the route of access. BLM may not, however, absolutely forbid mining or totally bar access to a valid mining claim. Citation Omitted. The reason, of course, is that such action would totally frustrate the congressional policy, as expressed in the mining laws, which accord a mining claimant rights, even against the Government, upon the discovery of a valuable mineral deposit. Thus, while BLM clearly has some discretion in the approval of mining plans of operations, there are parameters which establish the limits of its exercise. Nevertheless, because of BLM's ability to modify plans submitted, we agree that approval of a mining plan of operations is Federal action within the scope of 42 U.S.C. 4332 (1982).

Plan Approval May Constitute "Major Federal Action"

The approval of a plan of operations not only is a "Federal action," requiring an environmental assessment, but may also be a "major Federal action" requiring an environmental impact statement. In Southwest Resources Council, supra at 121, the Board discussed this possibility as follows:

> Whether or not such approval constitutes "major federal action significantly affecting the quality of the human environment," however, is a question of fact determinable only within the confines of a specific case. It is to be expected that some plans of operations might have impacts of such a nature so as to compel the preparation of an EIS, even given the fact that BLM lacks authority to totally prevent mining in the context of approving a plan of operations. Indeed, the regulations clearly contemplate such an eventuality. See 43 CFR 3809.1-6(a)(4). We agree with appellant that there may be situations in which Federal approval of discrete mining plans of operations ultimately necessitate the preparation of a regional EIS because the mining activities result in synergistic or cumulative impacts which are best considered in a unified document.

Contest Action Is Not Basis for Rejecting Plan of Operations

A contest action on a mining claim cannot be used as a basis for rejecting a plan of operations. Patsy A. Brings, 98 IBLA 385 (1987); Hiram Webb, 105 IBLA 290, 312 (1988).

Upon Issuance, 3809 Decisions Have Immediate Effect

Decisions issued by the Interior Department are "not effective during the time in which a person adversely affected may file a notice of appeal." 43 CFR 4.21(a). Furthermore, "the timely filing of a notice of appeal will suspend the affect of the decision appealed from pending the decision on appeal." Id.

The important exception to this general rule is found in 43 CFR 3809.4(b). This regulation specifically provides that decisions concerning mining plans of operation under the 3809 regulations have immediate effect. "Such decisions are not stayed pending appeal, although a stay can be granted by the authorized officer. If it is not, the decision is a final decision of the Department and a party aggrieved can either appeal

within the Department or take his grievance to the judicial branch, since his administrative remedy has, at that point, been exhausted sufficiently to permit judicial review. Citation Omitted. While further administrative review within the Department is possible, it is no longer necessary, and any party may pursue whatever remedy is deemed best. The Wilderness Society, 110 IBLA 67, 71-72 (1989).

BLM WILDERNESS STUDY AREAS

Nonimpairment Mandate

Section 603(c) of the Federal Land Policy and Management Act of 1976 says to manage wilderness study areas (WSA) so as "not to impair the suitability of such areas for preservation as wilderness..." Section 603 also provides for exception from the nonimpairment mandate with "grandfather uses." Grandfather uses are referred to in section 603 as follows:

> ...subject however, to the continuation of existing mining and grazing uses and mineral leasing in the same manner and degree in which the same was being conducted on the date of approval of this Act...

Therefore mining uses which existed on October 21, 1976, are restricted to the same "manner and degree." All activities except those exempt must be regulated to prevent impairment. If an activity cannot meet the nonimpairment standard, it will not be permitted. Some temporary uses are permitted even though they cause physical or aesthetic impacts, providing impacts are temporary and can be reclaimed. See Implement Management Plan issued December 12, 1979, as amended July 12, 1983, published by the Bureau of Land Management.

Lands in wilderness study areas must be managed to prevent unnecessary and undue degradation. This applies to both grandfather uses and valid existing rights. "Unnecessary and undue degradation" is defined to mean impacts greater than those that would normally be expected from an activity being accomplished in compliance with current standards and regulations and based on sound practices, including use of best reasonably available technology. 43 CFR 3802

Appropriation under the Mining Laws

Lands under wilderness study are still open to entry; however new locations fall under the nonimpairment standard. A post-FLPMA claim with a discovery has a right to patent, and on receipt of patent, the claimant is no longer subject to the nonimpairment standard.

Grandfather Uses

Existing mining and mineral leasing uses on October 21, 1976, may be continued in the same manner and degree. This means actual physical impacts on the land before October 21, 1976. In Havlah Group, 60 IBLA 349, 88 I.D. 115 (1981), the Board determined the following:

> Development of the claim detailed in the plan of operations exceeded the manner and degree of any mining use of the claim on October 21, 1976. Only assessment work had been carried out prior to October 21, 1976; there was no indication of development work as detailed in the rejected plan of operations. Therefore, the claimant did not qualify for grandfather rights. Id. at 358.

With grandfather rights you can continue operations in the "same manner and degree." This means to expand the scale of the operation at a logical pace and progression (i.e., exploration through development and through mining, with geographic extension until deposit is exhausted. Grandfather uses go with the land and cannot be transferred to other properties. It is the use rather than the claim that is grandfathered. A grandfathered mineral use may continue in the same manner and degree onto adjacent claims owned by the same person. A grandfathered mineral use outside the boundary of a WSA may extend into the area as long as the activity follows the logical pace and progression of development.

No Rights to Same Manner and Degree on Post FLPMA Claims Even if Same Lands

In Eugene Mueller, 103 IBLA 308, 310 (1988), the claimant contended that he should be able to continue uses on the land in the same manner and degree in which they were conducted on October 21, 1976, even if such activities impair wilderness characteristics. However, the Board determined that the preFLPMA uses occurred on pre-FLPMA claims that were subsequently declared invalid. Although he intends to continue working the same lands that were worked under pre-FLPMA claims, the work would now be done exclusively on post-FLPMA claims.

Therefore the Board approved the BLM's rejection of the claimants operating plan. Id. at 310.

Valid Existing Rights

The Department cannot regulate valid existing rights to the nonimpairment standard. The situation is given below for both mining claims and leases:

I. Mining Claims

Mining claims have valid existing rights if a discovery was made on the claim before October 21, 1976, and the claim continues to be supported by a discovery. A claim would also have grandfather rights if it were actively worked as of October 21, 1976. However a claim has a more liberal development standard under valid existing rights. Grandfather uses are unimportant if the claim also has valid existing rights because claimants may
proceed even if the activities exceeded the manner and degree that existed on October 21, 1976.

Activities to use and develop a claim must satisfy the nonimpairment criteria unless it would unreasonably interfere with the claimant's rights to use and enjoyment of the claim. If so, the claimant may proceed while regulated to prevent unnecessary or undue degradation.

In Havlah Group, 88 I.D. 115 (1981), appeal dismissed without prejudice, Havlah Group v. Watt, Civ. No. 82-1018 (D. Idaho, Nov. 16, 1982), the Board held that because the appellant's claims were located before FLPMA, he would be able to continue to mine to full development even if such operations would cause impairment - providing he could demonstrate "valid existing rights." However the IMP requires the operator to show evidence of discovery through field examination. The Board upheld the BLM decision because although the appellant was invited by letter to make a showing of discovery, he did not respond.

II. Mineral Leases

Mineral leases have valid existing rights if they were issued before October 21, 1976. Grandfather uses are not applicable to pre-FLPMA mineral leases because such leases enjoy more liberal development standards under valid existing rights.

Activities must satisfy the nonimpairment criteria unless this would unreasonably interfere with the rights provided by the lease. If rights can only be exercised through activities that permanently impair wilderness suitability, such activities will be allowed to proceed, but they will be regulated to prevent unnecessary and undue regulation.

In Colorado Open Space Council, 73 IBLA 226 (1983), the Board considered a case where the lease predated FLPMA but no drilling was underway on October 21, 1976. So the grandfather provision for existing use was not applicable. However, the Board agreed with the Solicitors Opinion, M-36910 (Supp.), 88 I.D. 909 (October 5, 1981), that the application of the nonimpairment standard to a pre-FLPMA lease might be impossible because of the protection which section 701(h) of FLPMA gives to valid existing rights.

Transfers of Interest

If a claimant or lessee transfers a claim or lease, the same valid existing right is recognized in the new owner. Valid existing rights are tied to a particular claim or lease and cannot be transferred to a different claim or lease, even for the same land.

Nonimpairment Standard May Be Exceeded if Valid Existing Rights

Development of mining claims with valid existing rights prior to FLPMA may, under certain circumstances, exceed the nonimpairment standard; however, such activities will be regulated to prevent unnecessary or undue degradation. In The Bureau of Land Management Wilderness Review and Valid Existing Rights, M-36910, 86 I.D. 89 (1979), M-36910 (Supp), 88 I.D. 909, 914-915 (1981), Solicitor Coldiron stated:

> * * * Although the nonimpairment standard remains the norm, valid existing rights that include the right to develop may not be regulated to the point where the regulation unreasonably interferes with enjoyment of the benefit of the right. * * When it is determined that the rights conveyed can be enjoyed only through activities that will permanently impair an area's suitability for preservation as wilderness, the activities are to be regulated to prevent unnecessary and undue degradation or to afford environmental protection. Nevertheless, even if such activities impair the area's suitability, they must be allowed to proceed.

Unnecessary and Undue Degradation Standard

The unnecessary and undue degradation criterion authorized by Section 603 c of FLPMA must not be applied to post-FLPMA claims. Ralph E. Pray, 105 IBLA 44, 46 (1988).

State Lands Surrounded by Federal Lands

In Utah v. Andrus, 486 F. Supp. 995 (D. Utah 1979), the Court held that where state land is encircled by Federal land within a WSA, the activity of the state's lessee may be regulated so as to prevent wilderness impairment. However, such regulation cannot be so restrictive as to constitute a taking. In California State Lands Commission, 58 IBLA 213, 219 (1981), the Board held that the BLM can regulate the route and method of access to state-owned lands to prevent impairment. However such limitations must not impair full economic development of the state--owned lands.

Areas Less than 5000 Acres

In December of 1982, Secretary Watt published an order which required that areas of less than 5000 acres could not be properly considered for wilderness status as a matter of law and should be deleted from WSA status. In Sierra Club v. Watt, 608 F. Supp. 305 (E.D. Cal. 1985), the Court noted that former Secretary Andrus had properly exercised his discretion under FLPMA to manage certain areas less than 5000 acres under a modified nonimpairment standard. Later in 1980, Secretary Andrus designated some these areas as WSAs under section 603 of FLPMA. The Court agreed with Secretary Watt that areas less than 5000 acres should not be managed as WSAs.

Split Estate Lands

In December of 1982, Secretary Watt published an order which required that split estate lands (U.S. does not own mineral rights) be deleted from the wilderness inventory and no longer managed under Interior's Interim Management Policy. In Sierra Club v. Watt, supra, the Court found that the "statute, section 603(a) of FLPMA, in plain and unadorned language requires the Secretary to review 'those roadless areas of five thousand acres or more...of the public lands, identified during the inventory as having wilderness characteristics.'" The Court also determined that the definition of "public lands" in FLPMA included split estate lands. Therefore the Court ordered the Secretary to restore

WSA status to all split estate lands that had been deleted by the order.

Management of Lands Deleted from WSA Status

All lands deleted from WSA status are to be managed according to the IMP issued December 12, 1979, as amended July 12, 1983, and Instruction Memorandum No. 83-237. These lands are also subject to the regulations in 43 CFR Subpart 3802. Areas deleted because they have less than 5000 acres are managed according to the IMP but not 43 CFR 3802. Instead, they are subject to the surface management regulations in 43 CFR Subpart 3809. Instruction Memorandum No. 84-11 (October 6, 1983).

Reclamation Deadline Under the Interim Management Policy

Impacts within wilderness study areas (WSA), except for grandfathered uses and those having valid existing rights, must be reclaimed to a condition of being substantially unnoticeable in the WSA as a whole by the time the Secretary of the Interior is scheduled to send his recommendation on that area to the president. Chapter I.B.2, page 10, Interim Management Plan

The latest possible date for attaining complete reclamation for all nonimpairing impacts within WSAs scheduled for statewide reporting is the date the Secretary is scheduled to sign the record of decision. To ensure the reclamation timeframe is met, each state establishes a final deadline for having all projects reclaimed within WSA's, regardless of the suitability recommendation on any specific WSA. The reclamation deadline can be no later than October 21, 1991, which is the statutory date by which the Secretary must report all recommendations to the President. From that date until Congress acts, the only activities permissible (other than grandfather uses and valid existing rights) under the Nonimpairment Criteria are temporary uses that create no new surface disturbance. Such uses may continue until Congress acts, so long as they can easily and immediately be terminated at that time, if necessary to manage the area as wilderness. Instruction Memorandum No. 86-491 (May 22, 1986).

Off-road Vehicles in WSAs

The regulations in 43 CFR 8340.0-5(a), which are the authority for closing areas to off-road vehicle use, make an exception for off-road

vehicles used in connection with lawful mining activities. Off-road vehicles may be used for mining purposes if expressly authorized by the appropriate BLM official. 44 FR 34834 (June 15, 1979); Manville Sales Corp., 102 IBLA 385, 388 (1988).

DESIGNATED WILDERNESS AREAS ADMINISTERED BY THE BLM

Validity Examinations on BLM-Administered Wilderness Areas

Regulations made effective on March 27, 1985 (43 CFR 8560.46(j), give procedures for reviewing plans of operations on unpatented mining claims within wilderness areas administered by the Bureau of Land Management. Before approving plans of operation or allowing previously approved operations to continue on unpatented mining claims (on newly-designated wilderness areas), a mineral examiner will conduct a validity examination to determine whether or not the claim was valid prior to the withdrawal and remains valid. If the mineral report indicates the claim lacks a discovery or is invalid for any reason, the plan of operations will be denied. Existing approved operations will be issued a notice ordering the cessation of operations. In both cases the BLM will initiate contest proceedings to determine the status of the claims conclusively. However, the regulations provide for allowing proposed operations that will cause only insignificant surface disturbance for purposes such as sampling and performing assessment work.

3802 REGULATIONS

Final Regulations: April 2, 1980 (45 FR 13968)

Authority: Sections 302 and 603 of FLPMA

Purpose: Procedures established to prevent impairment of the suitability of lands under wilderness review for the inclusion in the wilderness system and to prevent unnecessary and undue degradation.

Operations Existing on October 21, 1976

A plan of operations is not required for operations that were conducted on October 21, 1976, unless the manner and degree of operation on October 21, 1976 is being exceeded.

An approved plan may be requested if operations in the same manner and degree are causing unnecessary and undue degradation. Operations may cover previously undisturbed ground and may take place even if impairment of wilderness suitability should occur.

Plan Approval

The plan approval process is used to determine if the plan will result in wilderness suitability or if parts or all of the plan is based on mining claims with valid existing rights.

In Golden Triangle Exploration Co., 76 IBLA 245 (1983), the Board upheld the rejection of a plan of operation because the proposed operation would impair the naturalness of the WSA.

When Plan Is Required

An approved plan of operations is required when one or more of the following actions are involved (43 CFR 3802.1-1):

1. Construction of access including bridges, aircraft landing areas or improving or maintaining access facilities in such a way that changes the alignment, width, gradient, size or character of such facilities. In William E. Godwin, 82 IBLA 105 (1984), the Board held that significant alteration and enlargement of an existing access road in a WSA requires approval of a plan of operations;

2. Destruction of trees two or more inches in diameter at the base;

3. Mining operations using tracked vehicles or mechanized earth-moving equipment, such as bulldozers or backhoes;

4. Using motorized vehicles over other than "open use areas and trails;"

5. The construction or placement of any mobile, portable or fixed structure on public land for more than 30 days;

6. Use of explosives; and

7. Changes in a water course.

When a Plan Is Not Required

A plan of operations is not required for the following actions (43 CFR 3802.1-2):

1. Searching for and removing mineral samples or specimens;

2. Operating motorized vehicles over "open use areas and trails;"

3. Maintaining or making minor improvements of existing access routes, bridges, landing areas for aircraft or other facilities for access; however, the alignment, width, gradient, size or character of such facilities shall not be altered; and

4. Making geological, radiometric, geochemical, geophysical measurements using instruments or drilling equipment which are transported without using mechanized earthmoving equipment or tracked vehicles.

Proposed Plan of Operations Requires Validity Examination

When a plan of operations is reviewed for a pre-FLPMA claim, a determination must be made by an experienced mineral examiner as to whether a discovery existed on the date of the act and continues to the present. The test of discovery should be commensurate with the proposed action. A test somewhat less than that required for a validity determination in connection with a patent application may be required. Instruction Memorandum No. 82-99 (Nov. 27, 1981).

Pre-FLPMA Operations But Post-FLPMA Claims

In Ralph E. Pray, 105 IBLA (1988), the Board reviewed an appeal concerning a proposed plan of operations in a WSA. The proposed operation covered an area that was originally located in 1974, prior to FLPMA, but was abandoned by failure to comply with the recordation provisions of FLPMA. The claimant then located the claims again on October 28, 1979 (post-FLPMA). Even though the claimant established operations prior to FLPMA, he could not qualify for "valid existing rights"

or "grandfather rights"because his claim was located after FLPMA. Therefore he was subject to the nonimpairement standard.

Proposed Plan Rejected Because Road Cannot Be Reclaimed before Deadline

In Manvill Sales Corp., 102 IBLA 385 (1988), the Board upheld the rejection by BLM of a proposed plan of operation in a WSA. The BLM determined that the road the claimant wanted to use could not be reclaimed to meet the criteria of being substantially unnoticeable in the area as a whole by the time the Secretary was scheduled to make his recommendation to the President. Id. at 389-90.

Approval of Plan of Operation Rescinded Because of Inadequate Water

In Far West Exploration, Inc., 100 IBLA 306 (1987), plans of operation for a cyanide leaching operation were approved in error. Apparently, the BLM had assumed that an adequate supply of water was available to carry out the plans. Because a sufficient water supply was not available, the Board held that the plans could properly be rescinded. The Board went on to say that the company "must reveal how much water the chemical recovery process eventually proposed to be used will take, and describe in detail how the water will be obtained and where it will come from, and what effect this usage will have on the environment." Id. at 310.

Plan Rejected on Basis of Access Roads

If a claimant's mine plan could not meet the nonimpairment standard because road building and blasting impacts cannot be eliminated before the wilderness designation is made, the disapproval of such plan will be upheld on appeal. Eugene Mueller, 103 IBLA 308 (1988). The "impacts of proposed road construction are clearly proper considerations for review of mining plan operations in a WSA." Id. at 311.

Proposed Plans of Operations That Would Impair Suitability: Post-FLPMA Claims

In Keith R. Kummerfeld, 72 IBLA 1, 4 (1983), a 40-acre open pit mine and a road was proposed in a plan of operations. The plan was

denied by the BLM because it determined the proposed plan would impair suitability. However, the BLM did permit drilling and other related actions. The IBLA affirmed the BLM's rejection.

In Golden Triangle Exploration Co., 76 IBLA 245, 249 (1983), the IBLA upheld a BLM rejection of a proposed plan of operations because the proposed operation would impair the naturalness of the WSA. The BLM determined that the proposed drilling operations conducted in such climatic conditions would preclude revegetation for many years. Therefore the area could not be reclaimed to the state of being substantially unnoticeable by the time the Secretary would transmit his recommendations to the President.

In Doyle Cape, 79 IBLA 204, 208 (1984), the Board affirmed the BLM rejection of a proposed plan of operations because the proposed earth-moving operations would impair suitability by creating a new road system in a WSA.

Rejection of Proposed Modification to Approved Plan of Operation

In L.D.C. Artman, 98 IBLA 164 (1987), BLM rejected a modified plan of operation under the nonimpairment standard. BLM is required to either approve the plan subject to measures designed to prevent impairment of the area suitability for preservation as wilderness or reject the plan where anticipated impacts of mining operations would result in impairment of the areas suitability for preservation as wilderness. The Board concluded "that BLM properly rejected appellants proposed modification of their approved mining plan of operations." Id. at 168. To resolve the matter, the Board held at 169:

> * * * Accordingly, we conclude that BLM properly required appellants to cease those mining operations proposed in appellants' September 1984 proposal and to either submit proposed reclamation measures and complete such measures as approved or remove equipment, recontour and reestablish natural vegetation to BLM's satisfaction with respect to the area affected by such operations. Either course of action was calculated to preclude any impairment of the affected area's suitability for preservation as wilderness. Following appellants' receipt of this decision, they will comply with the reclamation requirements set forth in the October 1985 BLM decision within six months of the date of this decision.

The Board allowed mining operations to continue that were approved under the original plan of operations and to submit another proposed

plan of operations for BLM approval that will satisfy the nonimpairment standard.

BLM Cannot Completely Forbid Mining

When considering a proposed plan of operations, BLM cannot completely forbid mining either under the 3802 regulations, L.C. Artman, 98 IBLA 164 (1987), or under the 3809 regulations, Southwest Resource Council, 96 IBLA 105, 120, 94 I.D. 56 (1987).

Hearing Authorized on Denial of Mining Plan

In Norman G. Lavery, 96 IBLA 294 (1987), Mr. Lavery appealed a BLM district decision disallowing his plan of operations because the activities proposed would impair the suitability of the area for preservation as wilderness. The appellant requested that his case be assigned to an administrative law judge for a hearing. The Board exercised its discretionary authority and referred the case to an administrative law judge for a hearing on an issue of fact.

Appellants Burden on Denial of Mining Plan Approval

In Norman G. Lavery, supra at 298, the Board described the burden of persuasion by a preponderance of the evidence required of an appellant seeking the reversal of a decision involving lands in a WSA:

> * * * An appellant seeking reversal of a decision involving lands in a wilderness study area must show that it was premised either on a clear error of law or a demonstrable error of fact. Southwest Resource Council, Inc., supra at 42. The burden of persuasion by a preponderance of the evidence rests on appellant.

Right-of-Way Permit Required to Transport Water to Mining Claim

In Desert Survivors, 96 IBLA 193, 196-97 (1987), the Board held that a right-of-way permit issued under Title V of FLPMA before transporting water across public land for any mining purpose. Approval of a right-of-way application is discretionary and the application process is subject to an environmental assessment as required by NEPA. The Board said at 196:

> Clearly, FLPMA repealed or amended previous acts and Title V now requires that BLM approve a right-of-way application prior to

the transportation of water across public land for mining purposes.
* * * * * * *

BLM apparently contends that a mining claimant does not need a right-of-way to convey water from land outside the claim for use on the claim. It asserts that such use is encompassed in the implied rights of access which a mining claimant possess under the mining laws. Such an assertion cannot be credited.

The implied right of access to mining claims never embraced the right to convey water from outside the claim for use on the claim. This latter right emanated from an express statutory grant in the 1866 mining act. See 30 U.S.C. 51 (1970) and 43 U.S.C. 661 (1970). In enacting FLPMA, Congress repealed the 1866 grant of a right-of-way for the construction of ditches and canals (see 706(a) of FLPMA, 90 Stat. 2793) and provided, in section 501(a)-(1), 43 U.S.C. 1761(a)(1), for the grant of a right-of-way for the conveyance of water under new procedures. In effect, Congress substituted one statutory procedure for another. There is simply no authority for the assertion that mining claimants need not obtain a right-of-way under Title V for conveyance of water from lands outside the claim onto the claim.

The BLM has taken the position that this ruling does not apply to other forms of access under 43 CFR 3809, because the 3809 regulations specifically cover these types of facilities for plans of operations and notices.

Failure to Notify Owner

If the operator is not notified within the 30-day period or the 60-day extension, operations under the plan may begin. However, this does not constitute approval of a plan of operations. If operations later impair wilderness suitability, the operator is notified of the compliance and a modified plan of operations is requested.

Modification of Plan

In many cases it is not possible to file a plan for the entire life of the operation because certain aspects of the deposit are unknown. The operator files an initial plan and at the appropriate time files a supplemental plan. A supplemental plan is approved in the same manner as the initial plan. The operator either voluntarily submits a significant modification of the plan or is asked to submit a modification.

Bonding

Bonds are not required except in connection with an approved plan of operation. If a plan is not required, a bond is not required. The requirement for a bond is discretionary and depends on -

1. the potential for surface disturbance
2. operator's past record of reclamation

The amount of bond should be based on the estimated cost of reclamation. When a claim is patented or disturbed land is satisfactorily reclaimed, the bond may be reduced proportionately.

Noncompliance

Noncompliance results where the operator -
operates without having filed a plan or bond
failed to comply with requirements of an approved plan of operations
failed to comply with the 3802 regulations

and the noncompliance is causing -
impairment of wilderness suitability, or
unnecessary or undue degradation

If the above occurs, the authorized officer shall serve a notice of noncompliance upon the operator. An operator who fails to file a plan of operations and ignores the notice of noncompliance should be enjoined from operating by a court order.

Criminal Penalties

There are no criminal penalties expressly contained in the 3802 regulations. However Instruction Memorandum No. 85-389 (April 18, 1985) points out that if operators who fail to obtain proper authorization with an approved plan and continue operations or fail to respond to a notice of noncompliance may be cited for violation of 43 CFR part 8340 or part 8360 or both. The conduct is criminal under these provisions.

Environmental Assessment

Once a plan of operations is filed, an environmental assessment must be prepared within the 30-day period.

Public Interest

If it is determined that there is substantial public interest in the proposed operation on the basis of the EA, an additional period, not to exceed 60 days may be required to consider public comments.

Mitigating Measures

If the proposed plan indicates that the proposed operations will impair wilderness values or cause unnecessary or undue degradation, the EA is used to develop mitigating measures. If mitigating measures are sufficient to compensate for adverse environmental impacts, the statutory threshold of significant environmental effects will not be crossed. Cabinet Mountains Wilderness/Scotchman's Peak Grizzley Bears v. R. Max Peterson, 510 F. Supp. 1186 (D.D.C. 1981) affirmed, 685 F.2d 678 (D.C.C. 1982).

Cultural and Paleontological Resources

A cultural resource inventory shall be completed before approval of a plan. Although the operator is not required to do the inventory, he may hire a qualified professional to expedite the process. If the operator discovers cultural resources, he must notify the BLM and leave it intact. Operations can proceed within 10 days after notification.

Notice of Suspension of Operation

Except for seasonal suspension, the operator must notify the BLM within 30 days of a suspension. During periods of suspended operations, the name and mailing address of the operator should be posted on the site.

Cessation of Operations

Within one year following cessation of operations, the operator must remove all structures and equipment and reclaim the site of operation.

Appeals

If adversely affected by a decision of the authorized officer or the State Director, the operator has the right of appeal to the Interior Board of Land Appeals. The adversed party from the IBLA has the right of appeal to the federal courts.

BLM'S SURFACE MANAGEMENT REGULATIONS

Introduction

The Federal Land Policy and Management Act of October 21, 1976 (FLPMA) directed the Secretary of the Interior to take any action necessary by regulation or otherwise to prevent unnecessary and undue degradation of the lands.

To implement this part of FLPMA, the Secretary made effective the regulations in 43 CFR Subpart 3809 effective on January 1, 1981. These regulations apply to surface disturbances made in connection with mining operations conducted under the Mining Law of 1872, as amended.

The compliance process is similar to that authorized by the Forest Service regulations (36 CFR 228). The final regulations address three levels of exploration and mining activities:

1. For casual use where mechanized earth-moving equipment and explosives are not used, there is no requirement to contact the BLM.

2. If proposed exploration or mining activities would cause a surface disturbance of five acres or less per year, the operator is required to submit a "notice" to BLM 15 days before starting work.

3. A plan of operations must be submitted to the BLM if surface disturbance is more than five acres per year, or if the operations are proposed in certain specified environmentally-sensitive areas.

All operations, whether casual, under a notice, or under a plan of operation must be reclaimed.

Jurisdiction of Regulations

The regulations generally apply to all BLM-administered lands subject to the mining law. The regulations do not cover the national park system, the national forest system and the national wildlife refuge system; also they do not cover lands where only the mineral interest is reserved to the United States.

Unnecessary or Undue Degradation

"Unnecessary or Undue Degradation" is defined in 43 CFR 3809.0-5(k) as surface disturbance greater than what would normally result when

an activity is being accomplished by a prudent operator in usual customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses. Failure to reclaim disturbed areas may also constitute unnecessary and undue degradation.

Relationship of 'Unnecessary and Undue Degradation" to Validity

In Southwest Resource Council, 96 IBLA 105 (1987), the appellant asserted that BLM cannot determine whether "unnecessary or undue degradation" is occurring without a determination that a valuable mineral deposit has been discovered; or in effect, arguing that any degradation of the federal lands caused by development is necessarily undue and unnecessary if there exists no right to enter such lands. The Board stated "that the determination of the question whether unnecessary or undue degradation will occur necessarily assumes the validity of the use which is causing the impact," and therefore a validity examination should not necessarily be prerequisite to approval of a plan of operations.

However the Board noted that BLM is not precluded from determining the validity of a claim. If "BLM determined that the claims were not supported by a discovery, the proper course of action would be to initiate a contest as to the claims' validity and suspend consideration of the plan of operations pending the outcome of the proceedings." Id. at 124.

3809 Regulations to Prevent Unnecessary or Undue Degradation

In Differential Energy, Inc., 99 IBLA 225, 229 (1987), the Board pointed out that the surface management regulations of 43 CFR 3809 were issued to implement the Secretary's statutory requirement to "take any action necessary to prevent unnecessary or undue degradation of the lands."

Casual Use - No Notice or Plan Required

No notification to the BLM is required for casual use, however casual use operations may be monitored to ensure that unnecessary and undue degradation does not occur.

The regulations define "casual use" as activities ordinarily resulting in only negligible disturbance of federal lands and resources. For example the use of mechanized earth-moving equipment and explosives is not allowed under casual use.

Notice Required for Disturbance of 5 Acres or Less

Operations on project areas, including access across federal lands, which cause a cumulative surface disturbance of 5 acres or less during any calendar year must file a notice with the district office of the Bureau of Land Management.

A project area is defined in the regulations as a single tract of land upon which an operator is, or will be, conducting operations. It may include more than one mining claim under one ownership as well as federal lands on which an operator is exploring or prospecting prior to locating a mining claim.

Before an operator may conduct additional operations under another notice, all lands disturbed under a previous notice must be reclaimed.

A written notice of planned activities must be submitted to the BLM at least 15 calendar days before starting operations. The notice must describe the operations and their location and must contain a statement that the lands will be reclaimed to the standards in the regulations. No bond is required.

BLM Does Not Approve Notice

The regulations show that BLM does not approve or disapprove a notice. Bruce W. Crawford, 86 IBLA 350, 391 (1985). If an individual is required by the regulations to file a notice and receives a notice of noncompliance for failure to file, he may remedy the deficiency by filing the required notice. Id.

Prior Approval for Occupancy Not Required

Under the regulations in 43 CFR 3809, there is no requirement that a claimant obtain prior approval to establish occupancy. In fact, a claimant could proceed to erect a cabin in the face of BLM's objections and not violate any element of the regulations. Bruce W. Crawford, supra at 389, 391.

However, the regulations require that such occupancy be duly "noticed" (described in a notice). Occupancy that is duly "noticed" can be prohibited, only by a showing that such occupancy results in unnecessary or undue degradation. Id. at 389, 391.

Notice Does Not Require Environmental Assessment

In Sierra Club v. Penfold, Civil No. A86-083 (January 29, 1987), the Federal District Court of Alaska held that the filing of a notice is not a Federal "action" under the CEQ regulations because no approval is required before beginning operations. NEPA documents are not required where there is no Federal "action." The Sierra Club had contended that no mining can proceed until an environmental assessment is completed.

Plan of Operations - Disturbance of More Than 5 Acres or Mining in Special Areas

A plan of operations must be submitted to the BLM if surface disturbance exceeds 5 acres for a single calendar year, or if the operations are proposed in the following areas:

1. areas designated for potential addition to, or an actual component of the National Wild and Scenic Rivers System;

2. areas designated for potential addition to, or an actual component of the National Wild and Scenic Rivers System;

3. designated areas of critical environmental concern;

4. areas designated as part of the National Wilderness Preservation System which are administered by the BLM;

5. areas withdrawn from operation of the mining laws in which valid existing rights are being exercised; and

6. areas designated as "closed" or "limited" to off-road vehicle use.

A plan of operations must be filed in the BLM District Office having jurisdiction over the lands to be affected. The regulations specify the contents of the plan which need not be prepared in any special form. Generally, the plan will describe operators, the property location, access routes, types of equipment, nature of the operations and a map will be required. The plan must also describe measure to be taken to prevent unnecessary or undue degradation and measures to reclaim disturbed areas.

Plan Approval

Upon submission of a proposed plan of operations, the BLM acknowledges receipt of the plan and has 30 days to approve or require changes in the plan. If changes in the plan are necessary, or additional

time is needed to review the plan, an extension of time, not to exceed 60 days, may be required; however, days during which the area of operations is inaccessible for inspection are not counted when computing the 60-day period.

Modification of Plan

The regulations provide for modifications of an approved plan. Significant modifications require approval in the same manner as an initial plan. Plan modification may either be required by the BLM or requested by the operator.

Two or More Plans of Operation on One Mining Claim

If more than one plan of operation should be filed for a single claim, each plan of operation will be reviewed on its own merits and approved if it complies with the regulations. The reason for this is that the Department of the Interior has no authority to become involved in determining right of possession of a mining claim.

Operating Plans Subject to Stipulations

In Draco Mines, 75 IBLA 278 (1983), it was held to be proper for the BLM to condition the approval of a plan of operation on the acceptance of stipulations designed to prevent unnecessary and undue degradation of the public lands. It is also required that such stipulations be reasonable and properly reflect considerations of the public interests.

Lands Disturbed under Prior Notice Must Be Included in Determining if Plan of Operations Is Required

Before conducting additional operations under a subsequent notice, the operator shall have completed reclamation of operations which were conducted under any previous notice. Differential Energy, Inc., 99 IBLA 225, 231 (1987). Therefore any lands disturbed by mining may be legitimately deferred, but all disturbed land "must be included in the computation of surface disturbance for purposes of determining whether a plan of operations is required." Id. at 231.

Bonding Requirements

Mining operations conducted under an approved plan may require a bond. The amount of bond is normally based on the estimated cost of reclamation; however, no bond may be required if the operations would cause only minimal disturbance to the land.

Environmental Assessment

Upon receiving a plan of operations, the BLM is required to make an environmental assessment to identify the impacts of the proposed operations on the lands and determine whether an environmental impact statement is required (EIS).

Burden on Claimant to Show Plan of Operation Is Not Necessary

Where a party appeals from a BLM determination that a plan of operations is necessary under the regulations, it is the obligation of the appellant to show that the determination is incorrect. Unless a statement of reasons shows adequate basis for appeal and appellant's allegations are supported with evidence showing error, the appeal cannot be afforded favorable consideration. Howard J. Hunt, 80 IBLA 396 (1984).

BLM Limits of Authority in Approving a Plan

In Southwest Resource Council, 96 IBLA 105, 120 (1987), the board described the limits of authority to the BLM in approving a plan of operation:

> When a mining claimant is required to file a plan of operations, however, BLM has considerably more leeway. It may make its approval contingent upon acceptance of various modifications designed to prevent or mitigate undesired impacts. Such modifications may make it more difficult or more expensive for the claimant to develop the property. BLM may require design changes in plant operation or in the route of access. BLM may not, however absolutely forbid mining or totally bar access to a valid mining claim. The reason, of course, is that such action would totally frustrate the congressional policy, as expressed in the mining laws, which accord a mining claimant rights, even against the Government, upon the discovery of a valuable mineral deposit. Thus while BLM clearly has some discretion in the approval of mining plans of operations, there are parameters which establish the limits of its exercise.

Plan Approval May Constitute "Major Federal Action"

The approval of a plan of operations not only is a "Federal action," requiring an environmental assessment, but may also be a "major Federal action" requiring an environmental impact statement. Southwest Resources Council, supra at 121.

EIS Required on Cumulative Impact of Numerous Plans of Operation

In Sierra Club v. Penfold, A-86-083 Civil (D. Alaska, January 9, 1987), the Federal District Court of Alaska ruled that under NEPA, BLM is required to study the cumulative impact of some 60 placer mining operations that contribute incrementally to siltation and other environmental degradation of Birch Creek - National Wild River. It was held that 60 or more placer mines are related in such a way as to require unified analysis under NEPA. The Court ordered BLM to conduct an environmental impact statement on the cumulative impacts on the watershed caused by individual operations disturbing five acres or more. Approximately 23 or the 60 placer mines in the watershed operated under plans of operation.

Noncompliance

Failure of an operator to file a notice or a plan of operations may result in being served a notice of noncompliance or being enjoined from continuing such operations by a court order. Also failure to reclaim disturbed areas or follow an approved plan of operation will subject the operator to a notice of noncompliance. Actions specified in a notice of noncompliance must be corrected in 30 days.

Failure to take necessary actions may be justification for requiring a plan of operations and mandatory bonding.

Noncompliance for Lack of State Permits

A notice of noncompliance may be based on the failure of an operator to obtain state permits. However, a decision alleging a lack of compliance with state permitting requirements should clearly delineate the permits needed and clearly describe the reasons why each permit is needed. Bruce W. Crawford, 86 IBLA 350, 401 (1985).

Court Approval of BLM Surface Management Regulations

United States District Court Judge Raul A. Ramirez issued an order to the locators of a mining claim enjoining and restraining them from conducting any mining operations on the claim unless they submit a plan of operations pursuant to 43 CFR 3809 and obtain approval. This is the first federal court requirement that a mining claimant comply with the BLM surface Management regulations. United States v. Bales, 522 F.Supp. 150 (E.D. Cal 1981).

Upon Issuance, 3809 Decisions Have Immediate Effect

The regulations specifically provide that decisions concerning the 3809 regulations have immediate effect. "Such decisions are not stayed pending appeal, although a stay can be granted by the authorized officer. If it is not, the decision is a final decision of the Department and a party aggrieved can either appeal within the Department or take his grievance to the judicial branch, since his administrative remedy has, at that point, been exhausted sufficiently to permit judicial review.

Appeals

Any operator adversely affected by a decision of the authorized officer has the right of appeal to the State Director of the BLM. The decision of the State Director, when adverse to the appellant, may be appealed to the Board of Land Appeals, Office of Hearing and Appeals. The adversed party in a decision of the Board of Land Appeals may then appeal that decision to the federal courts.

Public Availability of Information

The information submitted and specifically identified by the operator as containing trade secrets or confidential or privileged commercial or financial information shall not be available for public examination. Other information and data submitted by the operator shall be available for examination by the public.

LOCATABLE MINERALS

Definition of locatable minerals

Except as otherwise provided, all **valuable mineral deposits** in lands belonging to the United States... (30 U.S.C. 22)

Whatever is recognized as a mineral by the standard authorities whether metallic or other substance, when found in public lands in quantity and quality sufficient to render the lands valuable on account thereof,.. (43 CFR 3812.1)

The Mineral Leasing Act of 1920 and the Materials Act of 1947 excluded specific minerals.

Minerals that were never Locatable

Minerals or categories of minerals are identified by case law.

Type of use - fill, soil conditioners, base or uses almost any material could satisfy.

Widespread or very common materials

Metallic versus nonmetallic minerals

Minerals No Longer Locatable

Act of July 31, 1947, as amended by the Act of July 23, 1955

sand, gravel, pumice, pumicite, stone, clay

Mineral Leasing Act of 1920

oil, gas, phosphate, potash

Act of Sept. 28, 1962

petrified wood

WHO CAN LOCATE A CLAIM

Citizens?

Those who have declare their intention to become citizens

Minors?

Agents?

A company organized under any one of the states has adequate proof of citizenship to locate mining claims in any state.

Corporations?

An agent who locates in the name of a principal need not be a qualified locator.

Partnerships?

Not necessarily like a corporation

Depends on state law

Aliens?

Claims are not void, but voidable

The 1872 Mining Law specifies that only citizens or those who have declared that they will become a citizen may locate a claim.

If an alien owns a claim and conveys it to a citizen, the title is good if no rights were established before the conveyance.

An alien will lose a priority of rights contest even if he is the senior locator.

In J. Garth Woodward, 78 IBLA 112 (1983), BLM declared claims owned by an alien null and void. The IBLA reversed because part owner was a citizen.

Alien Corporations?

A corporation organized under the laws of the United States or any state may own claims, irrespective of ownership of stock by corporations or persons that are not citizens.

Stockholders need not be United States citizens.

LOCATION REQUIREMENTS

Federal Location Requirements

Location distinctly marked on ground so boundaries can be readily traced

location notice
- name of locators
- location date
- description of claim with reference to monument

Discovery before Location

Required by law and regulations

Exception - courts have approved prediscovery rights

Right of possession to claim determined by state courts

Perego v. Dodge, 163 U.S. 160 (1896)

State courts cannot determine rights of a claimant to public land - only relative rights.

No limit to number of claims per locator

Status of mining districts

Only have validity if consistent use - void when disregarded

Superceded by state law

State location requirements

States provide procedures for locating and recording claims and maintaining title through annual filing.

- claim shape and size
- posting notice
- marking claim boundaries
- discovery work
- recording
- relocation
- amendments

Compliance with location requirements of state and federal law is essential to valid location. Skaw v. United States (1987).

MARKING CLAIM BOUNDARIES

Claim boundaries must be marked or claim is invalid

Posting notice without marking boundaries is not enough.

Standards for marking boundaries

The locator is not expected to understand or follow a metes and bounds description.

The rule - so one accustomed to doing so can follow the boundaries.

Relocator may use original monuments

Even if relocating another claim.

Markings on ground control over description in notice

Obliteration of monuments will not affect validity

If not the fault of claimant

No requirement to restore them

Position of monuments may be established by a witness who saw them standing

Claims considered void where insufficient descriptions and markings on the ground

"locator may not acquire a claim merely by walking into the recorders office and filing a location certificate no matter how perfect the location may be" Flynn v. Vevelstad, 230 F.2d 695 (9th Cir. 1956).

Junior locator has burden of proof

When he locates over another because he could find no monuments.

LOCATION NOTICE

Federal regulations require certain information on discovery monument

1. course and distance from discovery shaft to some premanent well known monument.

2. names of adjoining claims.

3. how many feet on each side of the discovery monument.

Federal regulations required certain information on the location notice

name of the claim
name of the locator
feet claimed
direction from point of discovery

Reference to natural object or permanent monument

Courts have approved mountains, bays ridges, open cuts, drifts, tunnels hog backs, and stone monuments.

Regulations approve confluence of streams, intersection of gulches, stone monuments, blazed trees, ravines, buttes and hills.

Placer claims may be tied to lines of government survey.

Must not be so vague that the claim can be floated.

> 4.4 miles south of Rock Point light and 2.8 miles SW from the northerly side of Stag Bay. The court held that this is too much shoreline.

Standard - "an intelligent person with the knowledge of the permanent natural objects and permanent monuments in the vicinity" can find the claim. Flynn v. Vevelstad, supra.

To resolve conflicting claim description

1. calls to monuments - natural or artificial

2. calls to boundaries
   calls of courses control over calls of distances or distance yields to the course

3. area of land

where the above rules are inconsistent, the intention of the parties control.

Error in description of claim may not be fatal

Rasmussen Drilling v. Kerr-McGee Nuclear Corp. (10th Cir. 1978)

Kerr-McGee was senior locator
clerical error placed claims in the wrong section
Kerr-McGee completed validation drilling, staking
and geophysical surveys
the junior locator was Rasmussen Drilling

The Court decided in favor of Kerr-McGee because the junior locator had **actual notice** and did not need to see recorded notice

(constructive notice). Bad faith on part of junior locator was an issue.

More than one claim described in location notice

depends on state law

Idaho case - all claims invalid

Colorado case - all claims but one invalid

Critical information that must be in the notice

Name of locators

location date

description

type of claim

name of claim

Position of the notice on the monument

should be visible

loss does not affect validity

Federal law does not require the location notice to be a sworn affidavit

Some states do

Senior locator has advantage in court

Courts will strain to help senior locator acting in good faith.

Claim jumpers seldom prevail.

STATE RECORDATION REQUIREMENTS

Federal regulations require recording under state law

Several IBLA decisions have upheld BLM decisions declaring claims null and void because they were not recorded with the county as required by state law.

FLPMA now requires it.

Recordation and bad faith by junior locator

Columbia Standard Corp. v. Ranchers Exploration & Development, Inc. (1972)

Ranchers neglected to record in 90 days as required by state law.

Ranchers staked 5 sections in 1967, posted and filed notices after 90-day period, and drilled 70 deep holes.

Columbia, the junior locator, topfiled with 157 claims in 1972

Columbia was aware of Ranchers claims and work but located because of late recording.

Court decided in favor of Ranchers because ?

Failure to record

McDonald v. Best (1960)

case involved recordation under the Mining Claims Rights Restoration Act.

No recordation so BLM tried to void the claim.

Court said:

1. actual notice is adequate substitute for recordation
2. no abandonment or forfeiture if no penalty for such in the statute
3. claimant can record late

CONFLICTING LOCATIONS

Relocation over valid location is void

A valid mining claim segregates, however

a junior claimant may obtain patent if senior locator does not file an adverse claim.

Conflicting location lines

Monuments and location lines may be placed on patented lands and other claims with a prior right.

If owner of prior right complains, use witness monuments.

Discovery must be on unappropriated land

Conflicting claimants held to prudent man discovery

Amax Exploration v. Mosher (1987) - Nevada Federal District Court held both junior and senior claimants to prudent man discovery standard

Claims of excess size

claims of slightly excess size are not invalid, however the excess is void and must be excluded.

If claim is unreasonably excessive in size it is void.

If excess size is an honest mistake, the whole claim is segregated from relocation.

Court determines right of possession

"United states is not a party to the proceedings" Perego v. Dodge (Supreme Court)

LODE CLAIMS

No limit to width of vein

May be wider than the claim.

Shape and dimension of lode

1. may not exceed 1500 feet along the vein
2. may not exceed 600 feet in width
3. end lines should be parallel or subparallel

Lode claim may be located in any shape

Even when the shape of a claim is not affected by surrounding claims, it may be located in any shape.

Vein may deviate from centerline of lode claim

A claims is not excessive in size even though more than 300 feet one side of the vein providing the statutory dimensions are not exceeded.

Boundary lines must not be irregular

no zig zag pattern

no octagon

no curved lines

Boundary lines may extend into withdrawn or patented lands

If necessary to get extralateral rights

Discovery must exist on unappropriated lands.

PLACER CLAIMS

Claim size

20 acres per locator

association placer claims

40 acres - 2 locators
60 acres - 3 locators
80 acres - 4 locators
100 acres - 5 locators
120 acres - 6 locators
140 acres - 7 locators
160 acres - 8 locators (maximum size)

Placer claims must conform to public land surveys

As nearly as practicable

Even if lands are unsurveyed

No survey for patent if located by legal subdivision

Snow Flake Fraction Placer (1908) cited with approval by 9th Circuit Court; government would no longer accept shoe string shaped claims

Exceptions to rule of conformity

43 CFR 3842.1-5(c)

To fit claim against prior locations

Gulch placers accepted under certain circumstances

narrow canyon

steep walls

no other resource values along the canyon wall

Lack of conformity is a question of fact

Claims are not invalid; claimant should amend.

One discovery for each placer claim

Regardless of size, 20 acres or 160 acres

each 10-acre tract must be mineral in character

Discovery is required before transfer of association placer claim

If discovery, an association placer claim may be conveyed to a single individual or corporation.

Building Stone Placer Act of 1892

Building stone must be located with placer location

All tracts in a placer claim must be contiguous

The entire claim is not open to location

The owner is allowed to select the portion he is entitled to retain.

Monumentation of placer claims is not required by federal law

But some state laws require it.

Dummy locators of association claim

When up to 8 locators (who work for corporation) locate an association claim and then convey it to the corporation.

Only the excess is void (generally everything over 20 acres is excess because a corporation counts as one individual).

If a locator has knowledge of a concealed interest and is party to the dummy location, then the entire location is fraudulent.

The ten acre rule

Each 10 acre tract on a placer claim must be mineral in character.

The ten-acre rule applies to all validity determinations.

The ten-acre rule applies to claims of all sizes.

10-acre subdivisions may include some nonmineral land

Subdivision of placer claims into 10-acre tracts where claims do not correspond to the public land survey system

U.S. v. Lara (On Reconsideration) affirmed by 9th Circuit Court.

If long axis of claim deviates from north-south or east-west:

1. Draw an imaginary center line parallel to the long axis.
2. Subdivide the claim along the center line to create as many 10-acre parcels as possible.
3. Parcels must be square.

TUNNEL SITES

Definition of tunnel site

"Owners of such tunnel shall have the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in the tunnel to the same extent as if discovered from the surface" (30 U.S.C. 27)

Location on line of tunnel is prohibited

"locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid." (30 U.S.C. 27)

The line of the tunnel represents the width of the bore.

There is no requirement to make a surface location; however if discovered vein is part of a network of veins, the tunnel would not appropriate the network of veins like a lode claim would.

Procedure for locating tunnel sites (43 CFR 3843.2)

1. erect a post at the face of the tunnel

2. post a notice on monument
   tunnel right owner
   course of proposed tunnel
   tie to known monument

3. place stakes along the line of the tunnel to show would be locators prospecting for lodes not known to exist that prospecting is prohibited.

Notice must be recorded with both county and BLM

1. state amount of money expended

2. extent of work

3. state intention to prosecute work with diligence

Tunnel site is not a mining claim

Supreme Court says it is a "means of exploration"

Is called a "tunnel site claim" in U.S. v. Parker

A discovery of mineral is not necessary to create a tunnel right or to maintain it

An important aspect of tunnel site validity is whether a tunnel was commenced at or near the time the tunnel site was located.

Tunnel site cannot be patented

Tunnel site must be prosecuted with reasonable diligence

Tunnel site is abandoned if failure to prosecute for 6 months.

Vein must strike the line of the tunnel and be discovered in the tunnel

Vein or lode cannot appear at the surface.

Right to vein discovered in tunnel dates back to location date of tunnel

Claim may be located on either side of the tunnel

Horizontal drill hole may qualify as a tunnel

Tunnel sites cannot be amended to lode claims

Because tunnel sites are rights-of-way, not mining claims

Tunnel sites in withdrawals

Once a discovery is made in a tunnel - even though after the withdrawal date - the discovery would relate back to the location date of the tunnel site.

so

A lode claim located over veins intersected in the tunnel after the withdrawal date would relate back to the date of the tunnel site location.

However, a tunnel site without a tunnel started between the location date and the withdrawal date would be void. Also the tunnel would have to be pursued with diligence.

Adverse proceedings by tunnel owners

Until discovery in tunnel, tunnel owner cannot adverse a lode patent application.

However, even after patent is issued, the tunnel owner would have the right to blind veins.

MILL SITES

Lands open to mill site location

Land must be unappropriated and open to location under the mining laws.

If United States owns surface but not minerals - not open.

If United States own only the minerals - not open.

Three types of mill sites

1. in connection with lode claims
2. in connection with placer claims
3. independent mill sites

Mill sites in connection with lode claims

"nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes..." (30 USC 42a)

Requirements to patent the 2 types of dependent mill sites are similar despite the different language

Mill sites in connection with placer claims

Act of March 18, 1960.

"for mining, milling, processing, beneficiation, or other operations in connection with such claims, and is used or occupied by the proprietor for such purposes..."

Essence of mill site appropriation is use or occupancy

a prima facie case of no use or occupancy is a strong case.

Independent mill sites

"the owner of a quartz mill or reduction works, not owning a mine in connection therewith..." 30 USC 42b)

Mill sites must be non mineral in character

Date title of mill site commences

Title begins when mill site is actually occupied or used for mining and milling purposes.

Where there is no conflict (with a lode), the title commences at the time of location.

Date mineral character of mill site is determined

When use or occupancy is established rather than location or discovery date of conflicting lode claim.

This is the only way to protect improvements and expenditures.

Procedures for location of mill sites

1. legal subdivision for surveyed lands

2. metes and bounds if unsurveyed

Section 38 applies to mill sites

Formal location is not required if held and worked.

Mill sites on tailings classified as mineral in character

U.S. Silver Chief Mining Co., (1979)

Forest Service examiner found value in the tailings

No limit to number of mill sites

but they must be used or occupied

Public Law 167 applies to mill sites

You may use timber to construct mill

But you may not sell timber to buy equipment

Good faith use of mill site

If mill site is placed in desirable location

Validity of mill sites

Mill site must be used or occupied at time of withdrawal.

Improvements added after withdrawal cannot validate mill site.

Mill site on end line or side line of a lode

"nonmineral land not contiguous to the vein or lode,"

However, a mill site may adjoin the end line or side line if it does not incorporate part of the vein.

Definition of "used or occupied" for dependent mill site

deposition of tailings or overburden

storing or stockpiling ore

shops, offices, living quarters

collecting water for quartz mill

sinking of wells or improvements to water such as pumping stations pipelines and ditches

"some step in or directly connected with the process of mining or some feature of milling" Charles Lenig (1886)

Access roads are not a qualified use

Water conveyances are not either

springs do not qualify

2.5 acre rule

Each 2 1/2 acre aliquot part of a 5 acre mill site must be used or occupied for mining or milling purposes.

Where multiple mill sites are involved an alternate method may be used

Redescribe portions of mill sites to reach minimum number of mill sites that can describe the property.

Past or future use

Neither constitutes use or occupancy.

An intention to use does not qualify.

Must be used or occupied at the date of patent application

If occupancy but no present use, the claimant must show an occupation by improvements.

In Swanson, 21 years had passed since acquisition and other than a 30 day test run, no production. The IBLA held that several million dollars in improvements indicated good faith.

Continuous operation is required for independent mill site

"more or less continuous operation for custom work" U.S. v. Paden (1979).

Factors to be considered if an independent mill site is occupied but not used

U.S. v. Cuneo (1974)

1. time of nonuse
2. conditions of mill
3. potential sources of ore
4. marketing conditions
5. cost of operations - labor, transportation
6. economic feasibility

"We cannot establish a definite period of nonuse applicable to all cases"

Factors to be considered where dependent mill site is occupied but no present use

1. validity of claim if unpatented

2. extent of mineral reserves on associated claim

3. length of nonuse and time it may take to put mill site to use (in Swanson it was OK where 21 years of nonuse but extensive improvements)

Mining claim in connection with dependent mill site must also be examined

If claim is invalid - so is mill site.

Even if claim is patented, one must show mining operations on the associated patented claim.

Mill site may be contested without contesting validity of the associated claim.

Sequence for patents

Dependent mill site cannot be patented before associated claim is patented.

Dependent mill site may be located and patented long after associated claim is patented.

Mill site patent application may not be delayed because of possible environmental effects

Issuance of patent is not discretionary

Lode claim located over preexisting mill site

No ore may be removed from land embraced by the mill site.

Acceptable improvements on independent mill sites

1. "quartz mill or reduction works"

2. rock crusher to reduce gypsum to smaller size is not appropriate use of independent mill site.

3. quartz mill - a machine to crush quartz to separate gold or silver.

4. reduction works - works to remove metals from ores, smelting works, cyanide plant, etc.

Types of mineral processed by independent mill site

1. Must come from vein or lode - should be metallic minerals.

2. May not be used to process material from placer claims.

Assessment work or expenditures unnecessary for mill sites

However, work on dependent mill sites can qualify as assessment work on mining claim.

Dual use of mill site

Mill site may be used as both a dependent and independent custom mill site.

Adverse claim

Mill site claimant may not file adverse claim against mineral patent applicant.

A protest should be filed instead.

Adverse claims are filed only where priority of right is involved such as 2 mill sites.

PROPER TYPE OF LOCATION: LODE OR PLACER

One of the most poorly define areas of the mining law; there are many confusing and conflicting cases.

Cases tend to be conflicting because courts generally strain to protect the senior or original claimant.

Another problem - most mineral deposits do not fit readily in either category.

No rule of thumb definition

Lindley said "there can be no unyielding rule of thumb definition of a vein or lode - each case must be decided on its own merits"

This is one explanation of why we have so many definitions.

Definition of lodes and placers (statutory)

placers - "all forms of deposit excepting veins of quartz, or other rock in place"

lodes - "veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits.."

Importance of making the right selection

Cole v. Ralph, 252 U.S. 286 (1920)

"a placer discovery will not sustain a lode location, nor a lode discovery a placer location."

Features courts have relied on to determine lode or placer

1. placers consist of soft materials
2. method of mining or processing
3. placers are superficial deposits
4. lode is variation of the word lead
   - formation by which a miner can be guided
5. lode may consist of sedimentary rock
6. lodes have continuity and individuality
7. lode may lie on the surface
8. nonmetallic minerals may be located as lodes
9. boundaries of lodes may be determined by assay

Scientific definitions do not apply to vein or lodes

Depends on what is meant to the practical miner rather than scientific definitions by geologists.

For the protection of miners rather than interests of science.

Lode or placer is a question of fact

Large shapeless, mineralized area is a placer even though rock in place

Titanium Actynite Industries v. McClennan (10th Cir. 1969)

igneous rock
8 miles square
no known boundaries
historically mined by placer methods

Altered rock in place containing valuable crystals

Originally located as a placer then topfiled by a lode locator.

The deposit consists of feldspar crystals scattered through an igneous dike.

Oregon Federal District Court held it was a placer because only the crystals loosened by weathering could be mined.

Valuable rock may be a lode even though it does not contain valuable minerals

perlite

Coexistence of lode claims, placer claims and mill sites

Lode and placer claims can coexist even if different ownership.

mill sites are not compatible with either.

Good faith location should be protected

Lindley
American Law of Mining
Bowen v. Sil Flo Corp.

Lode versus placer under section 38

If the claim is improperly located as a placer and the junior locator topfiles, then the senior locator can establish a lode location under section 38.

Once claim is found to be invalid for lack of discovery, a locator cannot change the type of location. The issue of validity cannot be litigated twice.

Nonmetallic bedded deposits have long been a problem

Phosphate beds have been patented as both lode and placer claims

Dipping beds of phosphate between clearly-defined walls in a lode.

Perlite is located as a lode even though it exists as a horizontal blanket deposit.

A horizontal blanket of perlite is a lode if sandwiched between two other rock layers - even if the upper layer is partly removed.

Proper type of location for limestone

Depends on form and character

LODES OVER PLACER & PLACERS OVER LODES

Lode and placer claims are equal in rights and procedures

Clipper Mining Company v. Eli Mining & Land Company, 194 U.S. 220 (1904)

Lode claims may not be located on prior valid placer claims (if two different locators)

The Court then gave the reason you are required to survey out a known lode in a placer patent application. Because a lode deposit is deeper than a superficial placer deposit, the government charges $5 per acre for lodes claims and $2.50 per acre for placer claims.

Lode and placer claims located by the same claimant (on same ground), do not constitute abandonment

Amax Exploration,Inc. v. Ross Mosher (1987)

Lode and placer claims can coexist even if different ownership

"Both types of claims can of course, be made upon the same property and can co-exist, even though in different ownership." United States v. Haskins

Mill sites are not compatible with either because a mill site must be nonmineral in character

Category I - only one locator involved

If you own a lode claim, you have the right to locate a placer claim over it. Conversely, if you have a placer claim, you have the right to locate a lode claim over it. The order of location does not matter.

Category II - two or more conflicting locators

If you own a lode claim, no other claimant has the right to locate a placer claim over your lode claim (without your permission) unless you do not have a lode discovery to validate your lode claim. Conversely, if you own a placer claim, no other locator has the right to locate a lode claim over your placer claim (without your permission) unless you do not have a placer discovery to validate your placer claim.

Without your permission or acquiescence, it is an act of trespass for another to locate either a lode claim or a placer claim over your prior claim.

To be safe locate both lode and placer claims over the same ground

Because "a placer discovery will not sustain a lode location, nor a lode discovery a placer location," the safe approach may be to locate both types of claims. If there is any question as to the proper type of location, or there is the possibility that both lode and placer deposits exist you will have more protection with both types of locations.

Placer patent excepts known lodes

However, discovery after patent goes to the patentee

Placer claim located on mill tailings

Tailings must be abandoned prior to location.

Once severed from land, tailings become personal property, however, if tailings property of another by erosion, they become the property of new owner

AMENDED LOCATION VERSUS RELOCATION

Definition - Amercian Resources Ltd., 44 IBLA 220 (1970)

An "amended location" of a claim is a subsequent location intended to further the rights acquired by the earlier locator while making some change in the location, such as changing the name of the claim or its owners of record (as where the original claim has been sold) or excluding excess acreage. In contrast to a "relocation," an "amended location" does relate back to the date of the filing of the original notice of location, so that the filer does receive the rights associated with the earlier location, including its superiority to subsequent withdrawals, to the extent that the amended location merely further rights acquired by a prior subsisting location, and does not include any new land.

There is no reference in the mining law to amended locations, though there is in case law and state statutes.

In new regulations issued January 3, 1989, "amended location" was defined as a "location that is in furtherance of an earlier valid location and that may or may not take in different or additional unappropriated ground."

You cannot amend original locations not recorded under FLPMA

There have been many attempts amend old claims that were not timely recorded under FLPMA.

If the original location is not timely filed - an amendment is a relocation

The IBLA has held in several cases that if a location notice is not recorded timely as required by section 314 of FLPMA, the attempted amendment may be treated as a relocation or new location.

But new locations must be recorded within 90 days of the location date.

There is no requirement that "amended location" or "relocation" be designated on the certificate

Adjustment of boundary lines to take in new ground

Taking in new ground is only allowed if there is no intervening right such as a land withdrawal or another claim.

Amendments must be filed with the BLM and County

Particularly if claim description is changed.

Present title is required to amend a claim

Oral transfers of interest

Hugh B. Fate, 86 IBLA (1985) - involved an oral conveyance of a claim in Alaska. The Alaska statute of frauds at the time of the conveyance required a written agreement.

Most courts have held that a written agreement is necessary.

In Fate the IBLA said the U.S. may use the statute of frauds to challenge the validity of an oral conveyance.

Lode and placer claims are amended in the same manner

Placer location cannot be amended to lode location

Because the two types of claims are located for different reasons.

New names in an amended notice that are not in original

You cannot add names or delete names without a transfer of interest or conveyance. But such a notice may be treated as new location for new names and amendment for old names.

Court approved reasons to amend a claim

1. change in record owners if existing conveyance

2. to cure defects in the location notice

3. tie claims to monument

4. change name of the claim

5. to correct error in claim description

6. to delete excess acreage

Hearing may be required to determine if amended location is a relocation

Whether a claim is relocated or amended is a question of fact to be determined at an administrative hearing.

Right to amend after withdrawal

1. claim must have been valid at withdrawal date

2. no break in chain of title including validity from location date to present

3. amender must hold present title

4. no addition of new land after withdrawal

5. no new rights possible - a withdrawal is an intervening right

Location notice captioned as both an amendment and a relocation certificate

BLM cannot maintain two files on the same mining claim which purport to carry parallel and continuing rights.

You cannot assert that a claim is both a relocation and an amendment in the same document.

A dual-captioned location certificate, without a statement on the owner's intention, will be processed as an amended location. No new file will be established.

Original and amended location certificates construed together

Even though an original location certificate or an amended location certificate is insufficient when standing alone, the location will be valid if they are sufficient if construed together.

RECORDATION OF CLAIMS AND SITES

Authorized by section 314 of the Federal Land Policy and Management Act of October 21, 1976 (90 Stat. 2769; 43 USC 1745)

Primary primary value is to remove cloud on title to lands where claims were recorded but abandoned and to facilitate the examination of mining claim titles.

Failure to record under section 314 of FLPMA results in conclusive abandonment of the claim.

Recordation of claims located on or before Oct. 21, 1976

1. Claims must have been recorded within 3 years of the act - on or before October 22, 1979.

2. one of the following must also have been filed on or before October 22, 1979:

evidence of performance of assessment work
notice of intention to hold
detailed report of surveys

Recordation of claims located after Oct. 21, 1976

Must be recorded within 90 days of location.

Date of location

Regulations say "the date determined by state law"

As a practical matter, decisions by the IBLA have generally treated the date of location as the date of posting stated in a recorded location certificate.

Failure to include the date is curable.

Curable defects

Items required by regulations but not the statute.

Computing the 90-day period

Date of location is not counted, but the last day of the period is.

When the 90th day falls on Sunday or a holiday, the next day the office is open is the 90th day.

Filing in the proper office

Only the BLM state office

Claims on the dividing line may file in either office.

Information on the location notice

1. claim name or number

2. Name and address of owner

3. type of claim or site

4. date of location

5. based on description it must be possible to plat a claim within a quarter section

If not provided within 90 days notice, a claim may be cancelled.

6. claim described by narrative or map sufficient to locate the claim on the ground.

A legal description is sufficient - no map is required.

Give section, quarter section, township, section and meridian.

Claims located by metes and bounds must refer to a natural or man-made monument.

Distance from the monument may be paced off and need not be exact.

The test is whether the claim may be found by the information submitted.

If the information is sufficiently deficient, it should be tested in the field.

Service fee

One-time fee of $10 per claim required with initial recordation.

December 15, 1982 amendments to the regulations make failure to include a fee a curable defect.

Possessory title based on section 38

Several IBLA decisions require that claims with titles initiated under section 38 must have recorded under section 314 of FLPMA.

Rival claimants

Where two or more rival claims covering the same ground are recorded, all will be accepted.

Location notice must be filed with both the BLM and county recorder

Amended notices must also be filed.

Two problems:

1. filing with BLM but not the county

2. filing different documents with the BLM and the county

BLM cannot require chain of title or any other information not required by the regulations

Recordation not required if patent application is on file

Providing the application contains all the information required by the regulations.

ANNUAL FILING REQUIREMENTS

Filing requirements for claims located before October 21, 1976

Filing shall be within the 3 year period following October 21, 1976, and each year thereafter beginning with the initial filing.

NL Industries, Inc. v. Secretary of the Interior, 766 F.2d 1380 (9th Cir. 1985).

Claimant made the initial filing in 1977, but missed the 1978 filing.

The Court held that "the annual filing requirement is triggered by the initial filing of a claim....if a filing were made in 1976, 1977 or 1978, the subsequent filings must be made in the year following the initial filing and, of course, each year thereafter."

Filing requirement for claims located after October 21, 1976

Filing is required on or before December 30 of each year following the calendar year in which the claim was located and every year thereafter.

New Service Charges

Annual filings, amended location notices and transfers of interest must be accompanied by nonrefundable fee of $5 for each claim, mill site or tunnel site.

Prior to January 1, 1991, filings that are not accompanied by the service charges will be noted as recorded on the date received provided that the claimant submits the proper service charge within 30 days of receipt of such deficiency notice.

Beginning January 1, 1991, fidlings that are not accompanied by the proper service charges will not be accepted and will be returned to the claimant without further action.

"Assessment year" distinguished from "filing year"

Assessment year - 12 noon, September 1 to 12 noon September 1.

Filing year - January 1 through December 30.

Evidence of assessment work must be for the previous assessment year

However 43 CFR 3833.2-1(2) says evidence of assessment work which is filed at any time during the interval of January 1 to September 1 shall be deemed to have been filed on or before December 30 of that calendar year.

Furthermore, Evidence of assessment work filed between January 1 and the following December 30 of the same calendar year shall be deemed to have been filed during that calendar year, regardless of what assessment year the work fulfilled under State law.

If a document filed during the calendar year is for the wrong year, it is curable.

Claimant may elect type of annual filing

Notice of intention to hold
Assessment work affidavit
Geological, geophysical or geochemical survey report

Annual filing must be postmarked by December 30 and received by January 19

New rules established December 15, 1982 allow 20-day grace period.

Regulations require "in an envelope bearing a clearly dated postmark"

Failures before December 15, 1982, are not curable says Supreme Court. Grace period cannot be applied retroactively.

Filing with Jan. 6 date-stamp but no envelope in the file with postmark was held by IBLA to have arrived timely.

Contents of the notice of intention to hold a mining claim

1. Exact legible reproduction or duplicate of instrument signed by owner of claim or his agent which was filed with the county.

2. BLM serial numbers and/or claim name.

3. Change of address.

No specific form to notice of intention to hold but it must be filed as a notice

In Add-Ventures,Ltd. (1986) the IBLA held that 3 letters sent to BLM with serial numbers did not qualify.

The Board said a notice must contain the following:

1. It must indicate the claim owner continues to have an interest in the claim.

2. It must be a copy of the document which was or will be recorded with the local office.

3. Claim name or serial number.

Notice of intention to hold where a deferment of assessment work was granted

You must reference the decision on file by date and serial number on the NOIH.

Contents of evidence of assessment work

An exact legible reproduction or duplicate of the document filed for record with the county recorder.

BLM serial number

Change in address

Curable deficiencies in annual filing instruments

Failure to file items required by the regulations but not section 314 of FLPMA is curable.

Filing fraudulent documents

A person who knowingly files false, fictitious, or fraudulent documents is subject to criminal action under 18 USC 1001.

Annual filing must include claim name or serial number

Failure to include claim name or number causes abandonment of the claim.

Common with large claim groups.

Claim designated only on map but not affidavit is not sufficient.

Deferment of assessment work serves as a notice

BLM Manual allows it.

Marcus D. Schneider (1986) case - no petition was filed.

No filing in the calendar year is an incurable defect

James v. Joyce (On Reconsideration), 56 IBLA 327 (1981) - one of the most commonly cited cases.

In Rupert Thorne, claimant filed 1980 assessment work in 1979 - then made no filing in calendar year 1980.

PreFLPMA claims with no 1978 filing: a curable defect

Harvey Clifton, 60 IBLA 29 (1980)

Claim recorded in 1977

First assessment work filed in 1979

No filing in 1978 - IBLA said it is a curable defect

PreFLPMA claims with no 1978 filing: an incurable defect

H.L. Baroid Services, 60 IBLA 90 (1981)

Initial filing of assessment work in 1977

No filing in 1978 even though statute requires (like N.L. Industries)

Notice of intention to hold for mill and tunnel sites

Shall file on or before December 30 of each year following the year of recording (not location like claims).

Need not be filed with the county.

Annual filing for tunnel and mill sites required in calendar year following calendar year of location

Before January 3, 1989, filing was required in calendar year following calendar year of location.

Failure to file annual notice for mill sites and tunnel sites is a curable defect

Mill sites - Feldsite Corporation (1981)

Tunnel sites - Heidleberg Silver Mining Co., Inc. (1981)

BLM must notify of deficiency and give 30 days to file notice.

BLM failed to notify mill site owner of defective filings before later annual filing

James J. Kohring, 89 IBLA 345 (1985)

BLM declared claim abandoned because no notice of intention to hold for 1979.

But by the time the claimant was notified, he had filed notices for 1980, 1981, 1982 and 1983.

Because the interim annual filing had been made between the year of no filing and the date of the BLM decision, BLM has waived the defective filing.

Assessment work straddles two assessment years

Red Top Mercury Mines

Work was done during late August and early September of 1980.

Affidavits for the 1980 and 1981 assessment years were filed in the fall of 1980.

There was no filing during the 1981 calendar year.

So the assessment work requirement was satisfied, but FLPMA filing was not.

Relocation of claim by same owners resulting in two serial numbers

Claimant filed proofs of labor under the original claim number.

The Board held if claims are not adverse, a single proof filed under

the claim name can be applied to both locations provided the relocation notice is treated as an amendment which relates back to the original.

BLM is required to merge the two files and see, if on a combined basis, all of the required filings are made.

Annual filings with both BLM and the county where the claim is located after September 1

Lynn Day, 63 IBLA 70 (1982)

So assessment work is not required until 1982 because the first work must be done during the 1982 assessment year.

Even though the assessment work was not required in the 1981 calendar year, the claimant must file under FLPMA.

Same notices filed with BLM and the county

Bernice Sheldon, 87 IBLA 161 (1985)

Her husband filed the first document and then died

She filed other document

The IBLA held they were the same

Evidence or notice not required if final certificate has been issued

Not a bad idea to file anyway to avoid topfiling.

In a case where a patent applicant withdrew claims from his patent application on September 1983 (where final certificate had issued), the Board held no filing was necessary through 1983.

Supplemental information required by the regulations cannot be used to settle priority of right disputes

Jackson v. Robertson, 763 F.2d 1176 (10th Cir. 1985)

One of the first cases where a party tries to use FLPMA recordation requirements to settle a priority of right dispute.

The Locke Case: Supreme Court holds sec. 314 of FLPMA is constitutional

United States v. Locke, 471 U.S. 84 (1985)

Claimants did not intend to abandon

10 sand and gravel claims - cannot be relocated

Nevada Federal District Court ruled sec 314 of FLPMA is unconstitutional.

Supreme Court reversed and held that intent to abandon is irrelevant - failure to comply with the statute automatically voids claim

Annual filing at BLM office 5 minutes late

Claimant filed at 4:20 p.m. so filing was date stamped the next day (Dec. 31).

He should have taken it to the post office.

BLM cannot accept annual filings after lands conveyed

BLM rejected filings because lands had been conveyed to the State of Alaska.

The Department cannot declare such claims void or accept Section 314 filings on lands it has no jurisdiction.

Problems with mail

Claimants generally allege that post office loses filings.

Erroneous information provided by BLM

This was a common accusation early in the program.

Does not relieve claimants of compliance with the regulations.

Evidence of filing

Only in a few cases have claimants managed to furnish sufficient evidence for the Board to hold that a preponderance of evidence supports a finding that the document was filed.

1. Bruce L. Baker - done with affidavits

2. Robert Reynolds - computer showed 1 of 5 claims filed; all were on one affidavit

3. Wells Horveid - BLM accepted affidavits that proof of labor was filed (claimant who topfiled protested BLM acceptance)

4. Robert Aumiller - computer printout showed claims and was accepted by Board as evidence

5. Milton Kutil - handwritten notation of BLM serial # of document by BLM employee at time original was filed.

6. Luella Collins - Copy of certified mail return receipt card showing delivery of some document to BLM on December 30.

7. Richard Willers - return receipt card showing some document submitted to BLM.

BLM is not required to determine legal status of claims

Even where claimants must meet deadlines to correct filings.

Federal records of mining claims are not official depository

Local records control the record title to mining claims.

Notice of transfer of interest must be filed in 60 days

Upheld by the 10th Circuit Court of Appeals.

Insures that owner of record will receive notice of actions regarding claims.

BLM must not determine standing of mining claim at request of rival claimant

Sandra Memmott (1985)

BLM had turned down request of rival claimants to issue abandonment decision.

Board upheld BLM decision and said BLM should only send out such decision in its periodic review of claim records.

Lode claim partially on withdrawn lands

Must have discovery on open land.

End lines and side lines may be extended on withdrawn lands.

Such a claim must be contested if validity is to be adjudicated.

Placer claim partially on withdrawn lands

That portion of a placer claim on lands not open to entry at the date of location may be declared null and void.

3,000 feet by 3,000 feet lode claim accepted as a tunnel site

BLM rejected recording.

Claimant said no tunnel site notices available.

The Board accepted for purposes of FLPMA.

Constructive service

Where BLM uses the mails to send notices, a party will be deemed to have received the communication if it was received at his last address of record.

DISCOVERY UNDER THE MINING LAW

Statutory definition

Act of May 10, 1872 (30 USC 22)

"...all valuable mineral deposits in land belonging to the United States.."

Prudent man test of discovery

Castle v. Womble, 19 L.D. 455 (1894)

... where minerals have been found and the evidence is of such a character that person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

Insufficient evidence of discovery

Davis v. Weibbold, 139 U.S. 507 (1891)

"such applications should not be granted unless the existence of mineral in such quantities as would justify expenditures in the effort to obtain it is established as a present fact"

Iron Silver Mining Company v. Mike & Starr Gold and Silver Mining Company, 143 U.S. 394 (1892)

"The amount of the ore, the facility for reaching and working it, as well as the product per ton, are all to be considered in determining whether the vein is one which justified exploitation and working"

Valuable mineral deposit is valuable in the economic sense

U.S. v. Coleman, 390 U.S. (1968)

"profitability is an important consideration in applying the prudent man test."
Converse v. Udall, 399 F.2d 616 (9th Cir. 1968) cert denied 393 U.S. 1025 (1969)

"a valuable mine need not be a profitable one" however "a profitable venture may reasonably be expected to result."

Exploration versus development

The Mining Law presumes that a discovery is physically exposed on a claim and that the claim is ready for development.

Therefore if additional exploration is necessary, there is no discovery.

Loss of discovery

Depletion of the deposit

Change in the economics

Discovery in each claim

Waskey v. Hammer, 223 U.S. 85 (1912)

"test of discovery is applied to each claim individually"

Each claim need not support an independent mine

Schlosser v. Pierce (1986) - a bentonite case

Under the following conditions, each claim need not be an independent mine:

1. Group of claims over a high-tonnage, low-grade deposit.

2. Ore can be extracted profitably from each claim under single large operation.

3. The economic analysis is based on the claim block as a whole rather than on individual claims and costs are apportioned to each claim.

Group development can be applied to a group of placer claims

The economic analysis may be based on claim block as a whole rather than individual claim.

For group development, claims must be contiuguous or nearby

Contiguous or nearby claims lend themselves to group development for economic reasons.

Paying mine need not be demonstrated

Adams v. U.S., 318 F.2d 861 (9th Cir. 1963)

"proved ability to mine the deposit at a profit need not be shown."

Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971)

"actual successful exploitation of a mining claim is not required to satisfy the prudent man test."

Claimant has the burden of proof that discovery exists

Discovery must not be split to validate two claims

If claim has discovery, it is disposable under the mining law regardless of whether higher value for other purposes

Early cases involved conflicts with agriculture.

In re Pacific Coast Molybdenum Co., 75 IBLA 16 (1983)

Protest to issuance of patent in Misty Fjords National Monument.

IBLA repudiated other values - the test of discovery is the same, even in a national park.

Contests between a claimant and the United States have required stricter application of discovery than contests between locators

However in Amax Exploration , Inc. v. Ross Mosher (1987), the Federal District Court of Nevada held both locators to a prudent man type discovery.

Validity is required at the date of withdrawal and the date of hearing

A break in validity causes a break in the chain of title.

Mineral examinations conducted years after the date of a withdrawal may be used to establish lack of discovery at the date of withdrawal

If disclosure of mineral before withdrawal, sampling and assaying after withdrawal may prove discovery

exposures of new reserves or increase in mineral price after withdrawal will not give a claim validity.

Location may precede discovery if no intervening rights

Order may be reversed despite statute.

However, location becomes effective on the date of discovery.

Assessment work or discovery work should not be confused with discovery

Older claims are not necessarily better claims.

Bad faith can invalidate a claim, even with a discovery

U.S. v. Zimmers (1984)

Claimants had occupied land for 5 years without work on claim.

Comparison of deposits to determine prospect of success

U.S. v. Walper, 77 IBLA 90 (1983)

35 claims over large disseminated moly deposit in Alaska was declared null and void.

Deposit was compared with others in 1978 USGS report

50-90 percentile in size

10th percentile in grade

Because grade was lower than minimum exploitable grade of major deposits, no cost estimate was necessary.

MARKETABILITY TEST

Marketability test has been applied by the Department since Layman v. Ellis, 52 L.D. 714 (1929)

Layman v. Ellis was expressly upheld in Foster v. Seaton, 271 F.2d 836 (D.C. cir. 1959).

"the Department has stressed the additional requirement of present marketability"

"mineral locator...must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit."

The Coleman case

U.S. v. Coleman, 390 U.S. 602 (1968)

"the mineral can be extracted, removed and marketed at a profit - the so-called marketability test"

"it is a logical compliment to the prudent man test"

Marketability test also applies to intrinsically valuable minerals

Converse v. Udall - but less strict application

Present marketability is required

Hollenbeck v. Kleppe, 59 F.2d 852 (9th Cir. 1979)

> "we feel the court correctly followed the test of present marketability"

Proof of profitability need not be shown

Profitability need not be shown at the date of withdrawal or the date of hearing.

Marketability test does not require proof of profitability for precious metals

Multiple Use, Inc. v. Morton (1974)

Lara v. Secretary of the Interior (1987)

Of course evidence of costs and profits of mining the claims should be evaluated to determine what a prudent man would do.

Marketability test does not require "a showing that the mineral in question can be presently extracted, removed, and marketed at a profit"

Higher standard of marketability for common materials

The marketability test for common materials (limestone) requires that they presently can be extracted and marketed at a profit. Lara v. Secretary

A new definition for "presently marketable at a profit"

In re Paciic Coast Molybdenum, 90 I.D. 352 (1983)

> The claimant "must show that as a present fact, considering historic price and cost factors and assuming that they will

continue, there is a reasonable likelihood of success that a paying mine can be developed."

Situations can occur in which "structural economic changes or technological break throughs invalidate historical conditions as a guide to present marketability"

In a 1989 case the Board applied a price of $403 per troy ounce of gold and $10.50 per troy ounce for silver to a placer gold operation. The basis for this was averaging the price at the time of sampling and then at the issuance of the decision.

Supply versus demand

Melluzzo v. Morton, 543 F.2d 860 (9th Cir. 1955)

To determine if demand exists for unmarketed material, the unmarketed material must be included with that from all other known potentially competitive sources.

If supply so overwhelms demand to such a level that it is not attractive to the prudent man, then the material is not marketable at a profit.

Dredge Corp. v. Conn, 733 F.2d 704 (9th Cir. 1984)

even though comparable claims are being mined, a new claim may be unprofitable because the market may be saturated.

Claimant has burden to show existence of potential buyers and price they would pay (common materials)

U.S. v. Foresyth (1987)

"primary impact of the Coleman case upon...similar cases is to place a burden upon a claimant to submit additional proof regarding the ability to mine at a profit."

Demand for material on each claim need not be shown

However claimant must be able to show general demand.

Prospective market or reserves with no market

Problems with widespread minerals such as stone, sand and gravel, bentonite, pumice, perlite, etc.

Claims may cover more reserves than market can absorb.

Barrows v. Hickel, 4477 F.2d 80 (9th Cir. 1971)

Materials must "possess value at the time of their discovery. Locations based on speculation that there may at some future date be a market for the discovered material cannot be sustained. What is required is that there be, at the time of discovery, a market for the discovered material..."

The Baker case

Baker v. U.S., 613 F.2d 224 (9th Cir. 1980)

Court held that there can be no such thing as an "excess reserves test" or a "too much test."

The Forest Service had determined validity on 6 placer claims for cinders.

The claims covered 15 million tons of cinders.

The claimants sales over 18 years amounted to about 1 million tons - much of which went for fill. (average gross income per year of $5555)

Numerous competitive sources of cinder in the vicinity.

Reserve supply could not be consumed in less than 400 years so IBLA had upheld denial of the claims because of excess reserves.

McCall v. Andrus decision

On July 10, 1980, 5 months after the Baker decision, the 9th Circuit Court issued McCall v. Andrus, 628 F.2d 1185, cert. denied (1981).

McCall acquired 26, 80-acre placer claims near Las Vegas (2,080 acres)

230 acres were patented - a 100 year reserve - and the rest were contested, although were the same quality.

There are huge reserves of similar sand and gravel in the Las Vegas area.

The 9th Circuit Court upheld the Boards decision that the claimant was asserting claims to more land and mineral than could profitably be exploited.

Therefore the contest tracts were nonmineral in character because they contained reserves for which there is no market.

The Oneida Perlite case

Oneida Perlite, 57 IBLA 167 (1981)

Oneida Perlite contains a good review of cases concerning reserves for which there is no market.

Involved 15 association placer claims covering 2,000 acres in the National Forest.

The examiner testified that on the claims there were 5.3 million tons of perlite

Enough perlite on the claims to satisfy the entire needs of the United States at the current levels of consumption for 300 years.

The IBLA ruled that the tracts were nonmineral in character because they contained reserves for which there is no market.

30-year supply held to be reasonable reserves

U.S. v. Anderson, 74 I.D. 292 (1967)

Marketability of comparable material from other claims

Melluzzo v. Morton, 543 F.2d 860 (9th Cir. 1976)

"claimant need not rely on his own successful marketing efforts to prove marketing efforts to prove marketability of his material. If the successful marketing by others has sufficiently established that the claimants comparable material is itself marketable, that can suffice."

Rogers v. U.S., 726 F.2d 1376 (1984)

Court held that successful marketing by a claimant of a gem mineral from one claim in a group could satisfy marketability from other claims that had comparable material.

but,

Dredge Corp. v. Conn, 733 F.2d 704 (9th Cir. 1984)

"even though comparable claims are being mined, a new claim may be unprofitable because the market has reached such a point of saturation that a new entrant cannot make a profit.

Market value of a claim does not relate to validity

Effect of lack of development on a claims validity

U.S. v. Zweifel, 508 F.2d 1150 (10th Cir. 1975)

Over a period of years, a presumption of no discovery is raised.

Claimant is responsible for maintaining adequate business records relating to both sales and costs of production

U.S. v. Arbo, 70 IBLA 244 (1983)

Tend not to be available in cases involving placer gold.

IBLA said if no tax records, then no credit for sale of gold.

Marketability must not depend on value added by manufacture

Marketability of material must be based on rough form - not polished material.

Profitability must be based on locatable minerals

Aggregation of profits from sale of locatable minerals such as gold with nonlocatable minerals such as sand and grave.

Common variety minerals locatable until July 23, 1955

Marketability must have met at the time of the act and reasonably continuously thereafter.

Sales are not absolutely necessary to establish the marketability of material from a claim.

Case where claims found to lack marketability

United States v. Melluzzo (1988)

1. aerial photo indicated no surface disturbance

2. claimant could not show demand as of July 23, 1985.

3. very little stone marketed from claims prior to July 23, 1955.

4. No evidence of costs of production of profits from sales.

Reasonably continuous market required

Marketability test must be met at discovery and reasonably continuous thereafter.

Removal of large amounts of material from claims without compensation does not meet marketability test.

COMMON AND UNCOMMON VARIETIES

Statutory authority for locating uncommon varieties

Act of July 23, 1955 (30 USC 611)

"No deposit of common varieties of sand, stone, gravel, pumice, pumicite or cinders and no deposit of petrified wood shall be deemed a valuable mineral within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws."

"'Common varieties' as used in sections 601, 603, and 611 to 615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value..."

The regulations 43 CFR 3711.1(6) also state:

> "Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not 'common varieties.'"

Before July 23, 1955, "specification" material was locatable

Before the Act of July 23, 1955, there was an exception to the general rule that materials used for fill, grade, ballast and subbase were not locatable.

Certain types of ballast and base for roadbeds which conformed to engineering specifications for such use were regarded as locatable because inferior grades would not suffice.

Stone versus mineral or element

Common varieties of sand, stone, gravel, pumice, pumicite or cinders generally consist of an aggregate of two or more elements and (or) minerals.

U.S. v. Pierce (1968) - granite with feldspar & mica

U.S. v. Bunkowski (1972) - gypsum/gypsite

U.S. v. Beal (1976) - ground feldspar and quartz

If rock is valuable for only an individual mineral or element such as gold, silver, feldspar or mica, it is not a common variety question and 30 USC 611 does not apply.

However if the entire rock is used and the constituent minerals are relatively unimportant, then 30 USC 611 may apply.

Immense quantities indicate a common variety

U.S. v. Coleman

"in view of the immense quantities of identical stone found in the area outside the claims, the stone must be considered a common variety."

Mineral is not unique if there is a readily available substitute

Stone in question must be compared with common varieties

You do not have to compare uncommon varieties with uncommon varieties.

U.S. v. Bolinder (1976) - do not compare geodes with other geodes.

U.S. v. Kaycee Bentonite (1982)

Comparison is made with stone in immediate region

U.S. v. Smith, 66 IBLA 182 (1982)

Comparison may be made with other stone in the immediate region in active quarries and exposed outcrops.

Amount of profit for uncommon variety

"profit to the claimant would be substantially more." McClarty v. Secretary of the Interior

Mineral is not unique if there is readily avaiable substitute

Unique properties distinguished from high quality material

Even if materials are the highest quality in the area, if they are used for the same purpose as lower quality material, then they are common varieties.

Building stone with no unique property

U.S. v. Henri (On Judicial Remand) - 1988

Case involved veneer building stone in Juneau -
- good cleavage
- flat surfaces
- had market value

but
- thick slabs
- poor coverage per ton
- small diameter
- very mediocre

Unique property based on comparisons with deposits nationwide

Although stone may be unique in Alaska, if compared to deposits nationally, it was very mediocre.

Transportation costs must be subtracted out

When comparing stone prices, transportation costs must be subtracted.

Stone cannot have a competitive advantage because shipping costs are less.

Intrinsic factors distinguished from extrinsic factors

1. value added by manufacture

2. scarcity of material

3. availability of water

4. proximity to market or construction

Uncommon varieties bootstrapped into profitable operation

(aggradation of profits from sales of common and uncommon variety minerals)

Deposits of uncommon variety minerals must be profitable on the basis of sales of the locatable minerals.

Uncommon variety minerals sold for common variety uses that do not command uncommon variety prices.

The sale of a common variety mineral is a trespass.

Standards to distinguish between common and uncommon varieties

The standards were first set forth in McClarty v. Secretary of the Interior, 408 F.2d 907 (9th Cir. 1969).

Restated in Massirio v. Western Hills Mining Association, 78 IBLA (1983).

1. There must be a comparison of the mineral deposit in question with other deposits of such minerals generally;

2. The mineral deposit in question must have a unique property;

3. The unique property must give the deposit a distinct and special value;

4. If the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use;

5. The distinct and special value must be reflected by the higher price which the material commands in the market place,
or
by reduced cost or overhead so that the profit to the claimant would be substantially more.

COMMON VARIETIES: SPECIFIC COMMODITIES

Limestone

Limestone located after July 23, 1955, cannot be used as concrete aggregate or soil additive

Limestone containing more than 95 percent calcium and magnesium carbonate is an uncommon variety.

Limestone used to manufacture cement is an uncommon variety.

Sand and gravel

Sand and gravel meeting construction specifications for concrete aggregate has not been locatable since July 23, 1955.

The McCormick case - an uncommon variety

85-90% proper size
naturally sorted
naturally crushed with angular edges
no drilling or blasting required
no overburden
clean - no washing required
meets specs without work
no chemicals required
royalty is several times average for area

Gemstones

Geodes are uncommon variety minerals

Gemstone permits do not apply towards validity

Obsidian may be a common variety mineral

Value of the gemstone as found on the claim rather than the enhanced value

Cinders and other volcanic products formed into cinder blocks are common variety minerals

Soil amendment must cause a chemical change rather than a physical change

U.S. v. Bunkowski - gypsite

Clays

U.S. v. Peck, 84 I.D. 137 (1977)

Two categories of clay

Common or ordinary clays - not locatable

structural brick, tile
heavy clay products
pottery, earthenware, stoneware - which cannot meet refractory and quality standards for high grade ceramic products such as china

Exceptional clay - locatable

high refractoriness
certain clays with special characteristics making them useful for particular uses such as the oil and oil well drilling industries

bentonite - U.S. v. Kaycee Bentonite Corp. (1982)
(widespread minerals may be locatable)

Two-fold test to determine if zeolites and other minerals are leasable or locatable

U.S. v. Union Carbide Corp., 84 I.D. 310 (1977)

The IBLA gave a two-fold test to determine if zeolites are leasable or locatable.

1. Leasable if "the sodium must be present in sufficient quantity so as to be commercially valuable."

2. "if the presence of sodium or any other material listed in the mineral leasing acts is essential to the existence of the mineral."

This test can be applied to chlorides, sulphates, carbonates, borates, silicates or nitrates of sodium.

MINERAL EXAMINATIONS

Interagency agreements

BLM - USFS (1957)

BLM - Park Service (1985)

BLM reviews and approves validity reports

BLM does patent examinations

Notification of claimant

Claimant needs to point out discovery and best place to sample.

Failure to notify does not disqualify case.

Refusal of claimant to allow examination

Discovery points must be open

Placer gold claims must be open to bedrock.

Charge of lack of good faith

Evidence must be clear and convincing.

Handbook for Mineral Examiners

Revised in 1984 & 1989
Standards for mineral examinations

Government mineral reports

The sole purpose of the report is to inform the authorized officer about mineral values so he can decide whether or not a contest complaint should issue.

GEOLOGICAL INFERENCE

Geological inference may be used to support a classification of land as mineral in character but cannot be used to establish a discovery.

Definition of geological inference

The "opinion of a geologist inferred or deduced from known and observed geological evidence" U.S. v. Lundy, A-30724 (June 30, 1967).

Making assumptions about a mineral deposit on the basis of geological evidence which may be any level of evidence short of actual physical exposure.

May be used for geologic inference but not discovery

geologic mapping
geochemical surveys
geophysical surveys

Use of geologic inference to show discovery

U.S. v. Feezor, 90 I.D. 262 (1983)

The IBLA expanded the use of geologic inference in determining the minimum reserves necessary to establish a discovery.

Geologic inference can be used where high sample values are of relative consistency.

Feezor overruled the holding in U.S. v. Edeline that discovery must be demonstrated before recourse to geologic inference. (if you already have a discovery, why worry about geologic inference)

Although isolated and erratic high values cannot be used to infer the existence of better values some place else on the claim, "where values have been high and relative consistent, geologic inference can be used to infer sufficient quantity of similar mineralization beyond the actual exposed areas."

Bureau of Mines mineral resource classification

Measured - exposed to sight, cores, accurate

Indicated - tonnage and grade calculated from some measurements, samples and some projections between samples.

Inferred - based largely on broad geologic knowledge of the deposit; ore bodies may be completely concealed.

In **Feezor** the Board held that not only can demonstrated reserves be used to show the quantity of ore necessary to show a discovery, but under certain circumstances, inferred reserves may also be used to show a discovery.

New York Mines (1988) - Reasonable estimate of inferred reserves may be considered when there is strong evidence to support it. Was not approved where claimant tried to extend reserves into primary mineralization on basis of high-grade, mined out supergene deposit.

SAMPLING AND ASSAYING

The primary purpose of sampling is to determine the average grade (quality) and the reserves (quantity) of a mineral deposit

1. There must be an adequate description of the manner in which a sample was taken or the sample is meaningless.

2. The sample must be related to the overall quality and quantity of the deposit.

3. An adequately described sample is one that is shown to be representative of the unit it purports to represent.

4. By themselves assays tell us nothing about a mineral deposit.

High assay values by a claimant are not sufficient evidence

Claimant may deliberately or inadvertently salt himself by selecting the best mineralization rather than taking a representative sample.

Sampling a minable width

Overburden is included

Sampling and mining with a suction dredge

If the claimant furnishes evidence that profitable recovery may be made by a method not addressed in the government's prima facie case, the government must also provide evidence showing the new method has not resulted in a discovery. U.S. v. Williams

In U.S. v. Arbo, the claimant maintained his discovery was in the bed of the river and requested the examiners to sample the river using a dredge -

> The mineral examiner said there is no definable deposit in the river.

Examiner should independently select the sample site

Sites recommended by the claimant should also be sampled if possible.

A grab sample has little value as evidence

You must know how and where the sample was taken.

Selection of assayers

Assayers should be selected on the basis of established reputation and registration under state law if required.

Nonstandard assay method cannot be admitted as evidence without a scientific basis

Assay values in old reports

generally meaningless because the ore may have been mined out.

Fire assays on placer samples

Would give anomalously high or low results depending on whether a gold color was heated in the crucible.

Assay samples must be compensated for the fineness of gold.

Atomic absorption assays are recognized test for gold content

Assayer or sampler not at hearing

Assays are generally admitted into evidence, however they will be accorded the appropriate weight.

ECONOMIC ASPECTS OF VALIDITY

Exploration, development, mining, ore processing and reclamation costs must be included in the determination of whether a claim has a discovery.

If a claimant proposes new cheaper methods of mining, he must be prepared to document that such methods lower the mining costs.

Mining costs must be considered

equipment - is amortized even if claimant has access to equipment at costs below what is available to the prudent person

extraction U.S. v. Garner (1977)

processing

labor - your own labor is not free

environmental costs

water supply

additional land U.S. v. Pittsburgh Pacific Co. (10th Cir. 1980)

financing

labor costs

costs of plant installation

anticipated sales volume

marketing costs U.S. v. Alaska Limestone Corp (1982)

unit price

identity and location of prospective purchasers

cost of delivery

Cost analysis required in prudent man determination

A mineral deposit becomes an ore deposit only if costs are less than sales price.

Basis for estimating mining costs

1. reliable cost analysis system
2. comparison to operating mine
3. costs must be itemized and specific

Earlier development costs are not considered in determining validity

Development costs for such items as constructing buildings, roads, rail and ore cars are not counted if such costs are already paid for. U.S. v. Mannix

Value added by manufacture

Value of the mineral must be based on its value in the raw state.

Commodity prices and costs for claims in withdrawn areas

Date of the withdrawal and the date of the hearing.

Date of costs in patent cases

Mine costs and commodity prices are taken at the date of final certificate.

Where the U.S. contests the validity of a claim, after issuance of the final certificate it is determining whether equitable title has already passed.

Closed or captive market

Does not meet marketability test.

Occurs where companies supply their needs from their own sources.

Unproven methods of mineral recovery

Claimant says gold can be detected in standard assays but cannot be recovered by conventional processing.

Claimant contends more gold can be recovered by secret process than is indicated in conventional assays.

Discovery may be lost

lost transportation
depletion of the deposit
loss of market

PREDISCOVERY RIGHTS

Pedis possessio - a foot hold, actual possession

A claimant in actual occupancy of a claim, even if he did not have a discovery could hold against anyone who had no better title so long as he was diligently seeking a discovery.

Purpose: to protect a locator until discovery is made

Actual possession versus constructive possession

Constructive possession has the effect of enlarging the area occupied.

Discovery is required for valid claim and for rights against the government

The statute and the regulations require a discovery before location.

Once a discovery is made, the law of possession does not apply.

Discovery makes continuous occupation unnecessary

"Actual and continuous occupation of a valid mining location based upon discovery is not essential to the preservation of a possessory right." Belk v. Meagher, 104 U.S. 279 (1881)

What may happen if occupancy is relaxed

Prediscovery rights "may be maintained only by continued and actual occupancy" Cole v. Ralph

Pedis Possessio requires physical occupancy on a continuous basis

Amax Exploration Inc. v. Ross Mosher (1987)

assessment work and sampling is insufficient to establish physical occupancy on a continuous basis.

Work requirement

Must be diligent and bonafide toward making a discovery. Amax Exploration Inc. v. Mosher

Geomet Exploration v. Lucky McUranium Corp.

Geomet Exploration v. Lucky McUranium, 601 P2d 1339 (1979) - Arizona Supreme Court

Senior locator, Lucky, detected radiometric anomalies.

Nov. 1976 Lucky monumented and posted 200 claims covering 4,000 acres, and then drilled a 10-foot hole on each claim.

Geomet, aware of Lucky's claims, entered area because no discovery or actual occupancy by Lucky.

Geomet drilled and made a discovery.

The Court said that "the doctrine does not protect on the basis of occupancy alone; the additional requirement of diligent search for minerals must also be satisfied."

The Court held in favor of Geomet on the basis that its entry was open, peaceable and in good faith whereas Lucky was not in actual possession.

Pedis Possessio on a group or area basis

Can a claimant maintain pedis possessio over an entire claim group while occupying only a small part of the group?

In U.S. v. Union Oil, 249 U.S. 343, the Supreme Court rejected the area basis.

MacGuire v. Sturgis, 347 F.Supp. 580 (1971)

The Court accepted the group or area basis for certain situations:

geology of the area is similar
size of the area is reasonable
discovery work is completed
fits overall work program
work program is diligently pursued
economics require a large property

In Geomet Exploration v. Lucky McUranium, the Court held that "pedis possessio protects only those claims actually occupied."

Continental Oil Co. v. Natrona Services, Inc., 588 F.2d 792 (10th Cir. 1978)

Senior locator Conoco staked 2040 claims

Drilled 48 holes with 40,000 feet

Spent $500,000 for geophysics and drilling

Natrona overstaked 1200 claims on basis of no discovery by Conoco

The judge ruled in favor of Natrona because Conoco had -
no overall work program
did not act in good faith
did not diligently pursue work
did not substantially comply with the law

The Amax v. Mosher case

Amax Exploration Inc. v. Ross Mosher - Fed. District Court of Nevada (1987)

Amax topfiled Mosher because of no placer discovery by Mosher

Amax had made geophysical and biogeochemical testing of the property.

The senior locator was held to the prudent man discovery test.

Neither party made physical and continuous occupancy of each claim.

The Court would not apply pedis possessio to the large block of "unoccupied claims located solely upon geologic inferences and an area-wide program of exclusion.

EXTRALATERAL RIGHTS

Extralateral rights to veins extend outside vertical side lines

1. must be a lode claim

2. vein must be discrete and continuous along downward course

3. vein must be inclined

4. top or apex of vein must lie inside the vertical extension of the boundary lines

5. end lines must be parallel

6. extralateral rights are confined between the vertical planes along the parallel end lines

Department does not require showing of apex

Mineral patentee is not required to show apex; the Supreme Court has approved the Interior Departments practice of not determining questions of extralateral rights.

Definition of "apex"

The "apex" of a vein is the "top" or highest part of all veins within the boundary lines

Does not need to reach surface.

To have valid location, it is unnecessary to have apex of vein within the claim boundaries.

Definition of "strike" of a vein

The surface outcrop is taken as the course or strike.

The true strike may be in a different direction.

The strike of the vein at the surface controls extralateral rights.

Definition of dip

Downward course of vein at right angles to the strike of the vein

Legal apex

Actual apex is on lands already appropriated.

Required characteristics of a vein for extralateral rights

Vein must have form

Vein must be well defined

vein must have foot wall

vein must have hanging wall

Vein must be continuous

Junior locator may have rights under senior location

Flat-lying veins have no extralateral rights

If end lines converge in the direction of the dip

Vein passing through both side lines

Vein crosses one end line

Intersecting or crossing veins

A blind lode belongs to the prior lode claimant even though the vein was discovered in the tunnel by a tunnel site locator

There is no right to tunnel in the country rock within the limits of anothers claim

Lines of a junior location may be laid across a senior location in order to secure extralateral rights

There is no right to enter the surface of another claim

prohibited by 30 USC 26

Extralateral rights under patented lands

A valid unpatented claim has extralateral rights superior to the subsurface rights later granted by a nonmineral patent - even though nonmineral patentee has mineral rights.

However, if lands were patented with mineral rights before the claim was located, extralateral rights would be precluded.

Claims on down-dip extension of vein with physical exposure may be patented

The Stillwater Mineral Patent case:

In 1982 Manville Products Corp. filed a patent in Montana for ore-grade layer.

Manville had apex as well as the down-dip claims.

The down-dip claims were validated by drilling.

The drill data suggested but did not confirm that the down-dip claims are an extension of the vein that crops out on the apex claim.

Forest Service wanted to patent only the apex claim and establish that the down-dip claims are invalid.

The Solicitor's opinion authorized patent of down-dip claims - but each claim was required to have physical exposure (drill data was sufficient).

Also the location and maintenance of claims on the dip is evidence of the claimants intent to abandon extralateral rights.

SURFACE RIGHTS ON MINING CLAIMS

Surface Resources Act of July 23, 1955

To provide a means for the United States to manage and dispose of vegetative resources and manage the other resources - except locatable minerals.

Claims located prior to P.L. 167 may retain surface rights if verified as valid.

Claims located after the Act are subject to surface management by the United States.

Uses on the surface of claims are restricted to those incidental to mining operations.

Surface rights of unpatented claims are subject to the right of the United States, its permittees and licensees to use so much of the surface as necessary or for access to other lands - but no material interference with mineral operations.

Procedure for surface rights determination

1. Notice to claimants is published in local area.

2. Field examination.

3. Title search of county records.

4. Owners of record notified.

5. Notice requires claim owner to file within 150 days of date of first publication a verified statement.

6. Failure to do so constitutes a waiver of surface rights.

7. If a statement is filed, claims are examined for discovery.

8. If discovery is not verified, hearing is held to determine who has right to manage surface resources.

9. If claimant loses, only the surface is lost - not the claim.

Claims with surface rights

Claimant has right to exclusive possession and occupancy for mining purposes, including control of the surface.

Claimant has no rights to surface resources for other than mining purposes.

How to determine if a claim has surface rights

1. Look for PL-167 line on plat to see if township has had surface rights determined.

2. If surface rights have been determined, all claims with surface rights should be listed at the right margin of the plat.

3. If surface rights have not been determined, any claim located before July 23, 1955 with present title dating back before the Act may be presumed to have surface rights.

However, a surface rights determination could be done at any time in the future and the rights could be lost at that time.

4. If a determination has been done and a claim is not listed on the plat as expected, then the actual case files should be examined.

5. Even though a claim is listed on the plat as having surface rights, such rights are lost if there is a break in the chain of title and the claim is relocated.

Claimants right to use surface resources

A claimant has a right to use surface resources such as timber and sand and gravel if such use is incidental to mining.

The right to use surface resources for mining purposes has no relation to surface rights under P.L. 167.

Of course timber, etc. cannot be cut and sold under any conditions - even if you wish to buy mining equipment with the money.

Right of access to a mining claim

Statutory right subject to regulations (43 CFR 3802, 3809 and 36 CFR 228) and sec. 302b of FLPMA.

Do not use mill sites.

May use right-of-way under Title V of FLPMA

Nonexclusive unless in public interest
Discretionary & subject to NEPA

Power lines and water lines -

Water lines require right-of-way permit if in wilderness study area (3802 regs.)

Right of public to use surface of mining claim

1. Public has right of access on unpatented mining claims without surface rights.

U.S. v. Curtis-Nevada Mines, Inc., 611 F.2d 1277 (9th Cir. 1980)

13 square miles of claims located barring public access to national forest.

Remedies if public interferes with mining:
a. protest to agency
b. bring suit to enjoin

2. Claimant with surface rights may exclude public

Locators right to occupy unpatented mining claim

Occupancy must be incidental to mining operation

"a permanent residence which is reasonably related to mining is permissible" U.S. v. Langley

A valid claim cannot be occupied unless active mining or exploration U.S. v. Nogueira, 403 F.2d 816 (9th Cir. 1968).

A discovery should not be necessary for occupancy; you should be able to occupy under pedis possessio while diligently trying to make a discovery.

Of course prediscovery rights are not good against the government.

Government remedies for occupancy trespass

1. Trespass action under **Nogueira**.

2. Initiate a validity exam followed by contest proceedings.

3. Initiate a contest action with hearing to determine if occupancy is incidental to mining. Bruce Crawford, 86 IBLA 350 (1985).

Hearing is necessary to determine if occupancy is incidental to mining

If no mining on claim, then determination that occupancy is not incidental can be accomplished with out a hearing.

If some mining, then a hearing is required and hearing must be held before ordering cessation of mining.

No rights by prescription

A long use of some right so as to give a right to continued use.

One cannot acquire rights by occupying a claim.

Abandoned property on mining claims

1. Items attached to realty - permanent, nonmovable fixtures such as a cabin.

When a claim is abandoned, fixtures become United States property.

If property is later relocated, the new owner has same rights as he has to other surface resources.

2. Items of personalty embedded in soil - not attached to realty; includes mining equipment but not treasure troves.

Upon abandonment, the property goes to the United States.

New locator has right to use it if use is directly related to mining.

3. Items of personalty not embedded in the soil such as tools and vehicles.

Upon abandonment, becomes the property of the finder rather than the United States.

However, the United States may acquire ownership by asserting possession.

If new claimant of abandoned property asserts possession before the United States does, ownership would vest in the claimant.

Title would be legal rather than possessory.

ASSESSMENT WORK

Assessment year

Period when work must be done.

September 1, noon to September 1, noon of the following year

The Act of 1958 changed the date from July 1.

Assessment work is not required the year a claim is located

$100 worth of work per claim

Regardless of claim size.

Should be the value of the labor rather than the price paid.

Type of work that qualifies

Because the Mining Law requires that discovery precedes the location of a claim, any kind of work that is used to find a deposit (exploration) would not qualify.

Qualifying work is work that assumes a discovery is made. It is work to develop or mine a known orebody.

Examples of work held to qualify

buildings
supplies
road construction
installation of machinery
excavate workings

Examples of work held not to qualify

machinery that can be used on other properties
(dredge)
eating utensils
sampling, assaying

Geological, geochemical and geophysical surveys qualify for assessment work

This is exploration-type work that would normally not qualify; however under certain circumstances such work could qualify.

Authorized by the Act of September 2, 1958.

Surveys may not be used more than 2 consecutive years or for more than a total of 5 years on any one claim.

Must be conducted by a qualified expert

Must file a complete report.

Group assessment work

"where such claims are held in common, such expenditures may be made upon any one claim."
30 USC 28.

Assessment work outside a claim or claim group

Water development and access road construction are the most common examples.

Burden of proof is on the claimant to show that the work would benefit the development of the claim

Work on patented claim applies to adjacent unpatented claims

Recent Montana case on cleaning an area around a tunnel to be used as a base of operations.

Work for contiguous claims may be included in a single affidavit

A very common practice which saves paper work

Assessment work costs may be accumulated over several years and included in a single notice

Jackson v. Robertson (10th Cir. 1985)

Does this mean you can carry over excess assessment work?

Burden of proof is on junior locator who asserts nonperformance of assessment work

Golden Condor v. Bell (1987)

Idaho Supreme Court held that Bell had to prove by clear and convincing evidence the work was not performed.

If there is no recorded affidavit, the burden of proof is on the claimant

O'Connor v. Wilke (1985)

Montana Supreme Court determined no affidavit filed but work was performed. Montana does not have an abandonment statute.

Failure to perform assessment work

Opens land to location, unless work is resumed before new location.

Relocation must be made after expiration of assessment year

Relocation on valid existing location is void.

Who may perform assessment work

In addition to any one of the claim owners, assessment work may be performed by an agent or one who has no interest in the claim.

Fraudulent acquisition of title

Where an agent, trustee or co-owner who is entrusted to maintain a claim lets the assessment work lapse and relocates in his own name, he is considered a trustee of the rightful owner and acquires no interest in the property.

Failure of co-owner to contribute to assessment work

If a co-owner does not contribute to assessment work, those who performed the labor may give -

1. personal notice in writing, or

2. newspaper published nearest the claim once a week for 90 days.

Jackson v. Robertson, 763 F.2d 1176 (10th Cir. 1985)

Forfeiture can be made if payment not in full.

Even death is no excuse.

Advertising out does not require judicial intervention.

DEFERMENT OF ASSESSMENT WORK

Petition must be filed for deferment

It must include a "notice to the public" attached to show notice was filed with the county recorder.

To qualify, you must have a legal impediment

Examples that are not legal impediments:
- bankruptcy
- government contest proceedings
- trespass action by government
- pending litigation
- unapproved plan of operations

Examples that are legal impediments:
- court injunctions
- government bar to entry

Period of deferment

Not to exceed one year, but may be deferred for one more year.

Not to exceed 2 years, even if cause is not removed.

Period may be extended by judicial declaration.

When must deferred work be performed

Deferred work must be performed not later than the assessment year after expiration of any deferments granted.

Recordation of deferment

A notice to the public of the claimant's petition for deferment is recorded with the county.

So is a copy of the decision from BLM granting the deferment.

Record notice with BLM and county

BLM also accepts petition for deferment or deferment if it is recorded with the county.